93-433

No. _____

Supreme Court, U.S.
FILED
SEP 17 1993
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In The

Supreme Court of the United States

October Term, 1993

ESTATE OF JANICE D. PITRE,

Petitioner,

v.

WESTERN ELECTRIC COMPANY, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a class action in which gender discrimination was proved, did the lower courts misapply this Court's ruling in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 421 (1975) ("[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury"; and courts should strive to award "the most complete relief possible")?

2. Did the court of appeals err in holding that the district court, which found gender discrimination over a substantial period of time, had discretion in a Title VII case to choose a remedy that resolved ambiguities with respect to what employees would have earned in favor of the discriminating employer and to reject the remedy suggested by the injured employees which would have resolved the ambiguities in their favor?

3. Did the lower courts err in adopting a remedy in a class action discrimination case which gave the discriminating employer the benefit of two assumptions, unsupported by any facts:

> (a) that the appropriate promotion pool to each grade consisted of employees in the next lower grade, even though company records showed that promotion commonly was made by skipping grade levels; and
>
> (b) that the injury to the class consisted only of pay lost as a consequence of some discriminatory demotions and layoffs between 1974 and 1976 and some promotion denials from 1977 through 1980, when the lower courts agreed that, as a result of continued discrimination

QUESTIONS PRESENTED – Continued

beginning in 1965, women were receiving less pay than they were entitled to receive from the date the class period began, and have continued to lose pay every day until the class period ended?

LIST OF PARTIES

The parties to the proceedings below were petitioner Estate of Janice D. Pitre and respondent Western Electric Company, as it was known prior to the AT&T divestiture.

Janice Diane Pitre originated the suit in 1976 and became the only named party to represent the class of 84 past and present employees of Western Electric. Ms. Pitre died during the pendency of the proceedings and her estate was substituted as the named plaintiff. Those class members are:

Judy Alonzo
Brenda Atkins
Deborah Belk
Kitty (Bowdish) Crawford
Beverly (Bradley) Carter
Donna (Brannon) Easter
Susan Brannon
Kelli (Briggs) Tinsley
Margery Brown
Amelia Calvin
Judy Campbell
Lois Campbell
Patricia (Chase) Milburn
Henrietta Cipolla
Karen Cook
Debbie DeGraeve
Estate of Juanita Deutman, Steve Deutman, Admin.
Barbara Draskovic
Estate of Jeanne Fanning, James Fanning, Admin.
Joyce Fuhrman
Sandra (Fuller) Medling
Mary M. (Garth) Davis
Alice Gomez
B. Ellaine Grecian

LIST OF PARTIES – Continued

Martha Groh
Connie Grosdidier
Pat (Gulley) Pingleton
Barbara Hartsell
Norma Herring
Diane Hodge
G. J. Holland
Helen (Hood) Harbolt
Janice (Hotchkiss) Tate
Ida Hueston
D. Helen Johnson
Michelle (Johnston) Hook
Ruby Johnston
Pat Jones
Jenise (Keck) Highberger
Susan Kilgore
Charlotte King
Barbara Lacy
Donette (Larkin) Maurer
Carol (Martin) Accurso
Mary Ann McCracken
Irene Mendez
Barbara Miller
Marjorie Miller
Norma Monroe
Gloria Moore
Barbara O'Dell
Amy Onka
Rykie (Pendergrass) Seyerle
Deborah England
Diane M. Douthit (Pitts)
Patricia Pitts
Sue Reed
Barbara Richardson
Diana (Rinker) Nelson

LIST OF PARTIES – Continued

Estate of Sarah Rogers, Debbie Toeneboehn, Admin.
Judy Rainwater
Judith Schooler
Kenda (Shepherd) Price
Connie Smerchek
Gloria Smith
E. Dian (Somers) Miller
Marlena Spidell
Lorene Stanley
Rose Stroth
Dorothy Swope
Donna (Thorington) Scheidt
Martha Tomlin
Sandra Tribble
Elberta Volner
Connie Walsh
Bonnie (Warren) King
Louise Welker
Brenda Wienke
Willa Wilhoite
Chettaria Williams
Rhonda Williams
Alma Wynne
Debbie (Yates) Toeneboehn
Patricia Yurchak

After the AT&T divestiture, Western Electric became AT&T Technologies Inc., a wholly owned subsidiary of American Telephone and Telegraph Co. Effective December 1989, AT&T Technologies, Inc. was merged into AT&T Co. and its operations were consolidated with AT&T.

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ESTATE OF JANICE D. PITRE,

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WESTERN ELECTRIC COMPANY, INC.,

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Estate of Janice D. Pitre, on behalf of a class of past and present women employees of Western Electric who proved the company had engaged in gender discrimination, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled proceeding on September 14, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit has been reported at 975 F.2d 700. It is reprinted in

the appendix, pp. 1a-12a, *infra*. Its decision to deny rehearing and rehearing en banc is reprinted in the appendix, pp. 13a-14a, *infra*.

The orders and judgment of the U.S. District Court for the District of Kansas (O'Connor, J.), setting forth a remedy are reported at 719 F.Supp. 966 and 735 F.Supp. 994. They are reprinted in the appendix, pp. 15a-57a and 58a-65a, *infra*.

A prior decision of the Tenth Circuit Court of Appeals in the first appeal of this case is necessary to a complete understanding of the facts and issues. Entitled *Pitre v. Western Elec. Co., Inc.* (*"Pitre I"*), it is reported at 843 F.2d 1262 (1988), and reprinted in the appendix, pp. 66a-104a, *infra*. The Memorandum and Order of the U.S. District Court for the District of Kansas (O'Connor, J.), dated August 9, 1983, declaring Western Electric liable for gender discrimination in employment is similarly necessary and is reprinted in the appendix, pp. 105a-146a, *infra*.

JURISDICTION

The judgment of the Tenth Circuit Court of Appeals, in part in respondent's favor, was entered September 14, 1992. The Tenth Circuit denied a timely petition for rehearing on June 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Janice Diane Pitre filed a formal charge on June 9, 1975, with the Equal Employment Opportunity Commission alleging that her employer, Western Electric Company, Inc., demoted her from her management position a month earlier. After a decision by the agency, Ms. Pitre filed suit in the U.S. District Court for the District of Kansas on November 1, 1976. Jurisdiction in that court was founded upon 28 U.S.C. § 1331. She subsequently filed a motion for class certification, which the district court granted. Ms. Pitre was the named representative of a class defined as "all female employees of Western Electric in positions ranging from M-10 through M-50[1] and in the position of section chief, who have been discriminated against in assignment, promotion, downgrading, or layoffs, and who have been employed at Defendant's facilities in Merriam and Lenexa, Kansas, after December 11, 1974."

Under applicable law, the defendant was liable for all actions that occurred after December 11, 1974, which was

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[1] During the 1960's and until October 1973, the office workers in the two facilities covered by the class action were grouped in eight levels in ascending order as D-1 through D-8. Effective October 1973, these were reclassified into a five-level plan, M-10 through M-50. There were also some high-ranking salaried workers called Associate Non-Supervisory Employees (ANSE) and Professional and Administrative Employees (PAE). Hourly employees were also divided into five grades, and an employee could be transferred between salaried and hourly positions. The management had a plant manager at the top, followed by two assistant managers, 10 department chiefs and about 40 section chiefs.

180 days prior to the filing of Ms. Pitre's complaint with the EEOC.[2] The parties agreed that the class period ended on December 31, 1980. Thus the plaintiff class sought damages and injunctive relief with respect to discrimination that occurred from December 11, 1974, through December 31, 1980.

The district court conducted a trial in May 1982, and issued a memorandum and order (pp. 105a-146a *infra*) finding that Western Electric had discriminated against Ms. Pitre individually by demoting her and had retaliated against her by failing to reinstate her to management. The court also found that Western Electric had discriminated against the class in promotions, demotions, layoffs and assignments during the 1970's and before.[3] In fact, the district court found continuous discrimination beginning before the effective date of Title VII and continuing after that date and up to the close of the class period.

The extent of the discrimination the district court found was enormous. When the company experienced its financial difficulty in the mid-1970's, it laid off 21 employees. *All were women*. Sixty-nine percent (69%) of

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[2] Back pay is recoverable for up to two years prior to the filing of the EEOC charge. 42 U.S.C. § 2000e-5(g).

[3] The evidence accepted by the district court proved that Western Electric had been experiencing certain financial difficulties which forced a reduction in the size of its operations. From mid-1974 until early 1976, the company demoted a number of management and salary-graded personnel, transferred others to hourly positions, and laid off others. No promotions were made in this period. In the following years, the company rehired some employees, restored others, and transferred or reclassified some employees.

the females employed in the salary grades were demoted or discharged as compared to 31% of men demoted and two laid off after they refused transfer offers. By March 1976, there was only one female section chief while there were 35 male section chiefs. At the highest level of the office workers, M-50, only one woman could be found in the midst of 22 men. At the next highest level, M-40, eight women held positions as compared to 14 men.

The district court found pervasive, continual and illegal discrimination, and awarded back and front pay and injunctive relief. *See Pitre v. Western Elec. Co., Inc.*, 843 F.2d at 1265 (p. 68a *infra*). Both the plaintiff class and the defendant appealed. The court of appeals affirmed the liability finding but reversed and remanded for a recalculation of damages and of the method of distribution to class members.[4] The court of appeals concluded that the district court erroneously assumed that it could use front pay to offset any error in awarding back pay, when the law made it clear that "[f]ront pay is thus a supplement to back pay, not a substitute for it." *Id.* (p. 101a *infra*).

On remand, the district court devised a new remedy without providing the parties an opportunity for a hearing. The district court properly decided that it was necessary to consider the history of discrimination at Western Electric from 1965, when Title VII first applied, to December 1974, the beginning of the actionable period. The district court's goal was to determine who would have

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[4] It reasoned that the district court "appears to have insufficiently considered the past effects of past discrimination in determining how to distribute the amount of back pay it deemed appropriate." *Id.* at 1279 (p. 102a *infra*).

been promoted between 1965 and 1974 in order to determine the positions that women would have held at the beginning of the class period *but for* the discrimination that had occurred. 719 F.Supp. at 971 (pp. 27a-28a *infra*).[5]

Company records showed that between 1965 and 1975 there had been nearly a complete turnover of section chiefs (30 vacancies filled), a full turnover of M-50's (32 vacancies filled) and a double turnover of M-40's (68 vacancies filled). Plaintiff argued that an appropriate remedy should assume that, absent discrimination during this period, women, who constituted approximately 50% or more of Western Electric's workforce, would have been promoted to at least half of all those vacancies.

The district court rejected the plaintiff class' suggestion and elected to follow a methodology which filled known vacancies with many more men than women. Since relevant company records had been destroyed, the court chose to recreate as its starting point a hypothetical 1965 work force by positing a conglomerate of the actual 1973-1974 work force. 719 F.Supp. at 971 (p. 28a *infra*).[6] It

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[5] The extent of the discrimination was substantial. For example, 28 men and only two women had been promoted to section chief from July 2, 1965, through mid-1974. During the same period 31 males were promoted to the D-7, D-8 or M-50 levels, while only one female was promoted.

[6] Plaintiff argued that, by assuming that the average or conglomeration of 1973 and 1974 figures could simply be transposed into 1965, the district court effectively ignored the finding that it had previously made – *i.e.*, that Western Electric had discriminated throughout this period. By 1973 and 1974, Western Electric had created a work force in which males held the most important and highly paid positions and females held less

then "promoted" a greater number of men than women under its construct until arriving at a hypothetical "ideal" workforce in 1974.

Next, the district court utilized the same approach to calculate the number of demotions and layoffs women should have suffered in 1974-1976 under its hypothetical work force and the number of promotions they should have received between 1977 and 1981. It then awarded back pay only for statistical "over-demotions" and statistical "under-promotions."

The class argued that women should have held many more of the higher positions in the 1965-1974 years than the district court's reconstructions supposed. Because of the percentage of women employed by Western Electric, and the substantial number of promotions made during the 1965-1974 period, plaintiff suggested to the district court that a fair and equitable way of giving the benefit of ambiguity (*i.e.*, how a non-discriminating employer would have filled the vacancies) to the class, as required by law, would be to assume that the various salaried positions would have been filled between 1965 and 1975 by men and women approximately in proportion to their respective representation in Western Electric's workforce.

Moreover, the plaintiff proposed that in order to resolve a second ambiguity (*i.e.*, the total earnings lost by the class during the remedy period) in favor of the class, as required by law, the defendant should pay for each year of back pay the difference between what women

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important positions. Transposing this force back to 1965 gave Western Electric the benefit of discrimination.

were proportionately entitled to receive and the amount they were paid. As an example, if women comprised 50% of the work force and were evenly distributed in each salary grade and at section chief, plaintiff argued that they should have received 50% of all salaries paid at those levels for a given year.

In rejecting plaintiff's approach and following its own methodology, the district court made two assumptions that gave the benefit of ambiguity to the employer and insulated Western Electric from the financial consequences for its long-standing illegal practices. The plaintiff challenged both assumptions as being contrary to the evidence, irreconcilable with applicable law and at odds with the remedial purposes of Title VII, given the findings of discrimination previously made by the district court and affirmed by the court of appeals.

A. The district court's first assumption challenged by the plaintiff is that women should not be permitted to skip one or two grades in the hypothetical promotion process:

> We held [in 1985] that calculations of back pay for each level from M-20 to section chief should be made by multiplying the percentage of women in the promotion pool (those persons in the next lower M-level category) by the number of promotions (of men and women) to the level given that year, and then subtracting from this figure the number of promotions actually given to women in that year. 719 F.Supp. at 968 (p. 19a *infra*). . . . *[W]e still believe that the appropriate pool for promotions to each grade consists of those employees in the next lower grade. Id.* at 971 (p. 27a *infra*).

The district court's use of this assumption markedly benefitted the employer at the expense of the class. The court's reconstruction of promotions for 1965 through 1980 paralleled Western Electric's actual promotion history – inching women up into the higher salary grades and into management very slowly. For example, as to the 30 section chief vacancies from 1965 through 1974, the district court calculated that only 6.56 women should be "promoted" while 23.44 men should be "promoted" (719 F.Supp. at 979, Table 2; p. 45a *infra*).[7]

Western Electric's own personnel records and the testimony of class members proved that it was common for promotions to be made by skipping grade levels. For instance, 20 of the 30 promotions to section chief from 1965 through 1974 involved employees who were upgraded directly from positions lower than D-8 or M-50. Nine of the next 16 promotions in the late 1970's came from positions lower than M-50. In fact, none of the women promoted to section chief had ever held a D-8 or M-50 position. Each one skipped at least one level when promoted to management, without exception. And every one of them, without exception, performed satisfactorily.

Moreover, the record demonstrates that experience at one level was not essential for acceptable performance at the next higher level. According to trial testimony, with few exceptions, the skills necessary for satisfactory performance in the salaried grades were acquired through on-the-job training, where the incumbent trained

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[7] Western Electric had actually promoted 28 men and two women to these openings.

the newcomer prior to moving on. On some occasions, temporary upgrades involved a jump of two grades. On-the-job training was also practiced at the supervisory level; Diane Pitre learned her duties in that way (pp. 111a-112a *infra*).

The class argued that, had the district court assumed that all women at the M-30 level and above were qualified for promotion to management, an assumption actually reflected in Western Electric's promotion practices, more women would have become supervisors under its "ideal" model, and many more would have been M-50's and M-40's. The class also argued that any ambiguity concerning the qualifications or eligibility of class members to hold M-40, M-50 and section chief positions should have been resolved in their favor because the employer could have taken all steps necessary to train and educate them.

B. The court's second assumption challenged by the plaintiff class concerned the nature and extent of the economic harm to the class:

> At issue in this action are a finite number of identifiable decisions by the defendant regarding promotions and downgrades. *We should focus these specific decisions and award the plaintiff damages when there is discrimination, rather than simply determining whether woman [sic] received a pro rata portion of all salaries paid.* 719 F.Supp. at 970 (p. 25a *infra*).

Thus, the court assumed that the only injury suffered by the class was pay lost because too many women were demoted and laid off between 1974 and 1976, and too few

women were promoted from 1977 through 1980.[8] Plaintiff argued that the actual economic injury to the class members took the form of salaries lost by the class as a whole ***on a daily basis*** throughout the class period. Under plaintiff's arguments, the lost pay includes amounts individual women would have earned between June 1973 and the present had they been performing as section chiefs, M-50's and M-40's in expected numbers, sums far larger than the amounts lost by those individual women who should not have been demoted and terminated between 1974 and 1976 and those women who should have been promoted after 1976.

Essentially, the class argued that the district court incorrectly assumed either that the earnings gap was not the result of illegal discrimination between 1965 and 1974 (despite its earlier finding of pervasive, continuing discrimination), or that the effects of that historical discrimination during the remedy period (June 1973 to the present) were not redressible, and that the district court did not remedy the real economic harm to the class.

The class' arguments were rejected by the lower courts. As a result, despite the court of appeals' remand to the district court for a recalculation of damages, the plaintiff class was left with a smaller real award[9] than the

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[8] Although women accounted for 48 M-level layoffs and demotions, while 15 men were demoted or took voluntary layoff, the district court determined that only 10.38 of the women's demotions and layoffs were compensable. 719 F.Supp. at 980, Table 3 (p. 46a *infra*).

[9] The total 1989 award is larger than the 1985 award in absolute terms only because of the addition of prejudgment

original 1985 award which the court of appeals had found to have been based on a model that failed to account adequately for historical discrimination.

The district court's remedy as of July 1989 awarded the class a total of only $123,054 in back pay for 1975 through 1980 plus prejudgment interest of $166,308. 719 F.Supp. at 973-4 (pp. 32a-33a *infra*). Under the remedy proposed by the plaintiff class, which assumed that half of all promotions since July 1965 had gone to women, the award for the same period for lost back pay would have been approximately $2 million (excluding overtime earned largely by men), with accrued prejudgment interest of over $3 million by July 1989. Thus the difference between the district court back pay and interest award of $289,362 and the award for which the class argued is nearly $4.7 million.

The district court ordered $453,480 in front pay for the years 1981 through June 1989, plus $197,669 in prejudgment interest. 719 F.Supp. at 975 (p. 36a *infra*). The class argued that $3.6 million in principal and $2 million in prejudgment interest was due. The difference between the district court front pay and interest award of $651,149 and the award for which the class argued is nearly $5 million.

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interest and several more years of front pay. Actually, the district court awarded about $13,000 more back and front pay award under the 1985 remedy overturned in *Pitre I* than it ordered in 1989. The 1985 back pay award for the period 1975-1980 was $124,073; in 1989 it was $123,054 (719 F.Supp. at 973; p. 32a *infra*). The 1985 front pay award for 1981-1985 was $217,710; in 1989 it was $194,806 for the same period (*id.* at 988, Table 9; pp. 54a-55a *infra*).

The total awarded to the class in 1989 ($940,511 as of 7/1/89) was even less than Western Electric had conceded it owed the class ($951,870 as of 1/1/89) in a brief filed with the district court.

The plaintiff class took a second appeal, pointing out to the court of appeals that the remand had resulted in a decreased award, one that compensated the class for only 5% of the back pay actually lost. This time, the Tenth Circuit affirmed the trial judge.

REASONS FOR GRANTING THE WRIT

I. **In a class action case in which gender discrimination was proved, the lower courts misapplied this court's ruling in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 421 (1975), that remedial compensation for a legal wrong which has been done shall be equal to the injury, and that discrimination victims are entitled to the most complete relief possible.**

II. **The court of appeals' holding that the district court, which found gender discrimination over a substantial period of time, had discretion in a Title VII case to choose a remedy that resolved ambiguities with respect to what employees would have earned in favor of the discriminating employer and to reject the remedy suggested by the injured employees which would have resolved the ambiguities in their favor is in conflict with every other circuit that has addressed the issue.**

III. **The lower courts erred in approving a remedy in a class action discrimination case which gave the**

discriminating employer the benefit of two crucial assumptions which were not supported by any facts; and the approval of such a remedy is inconsistent with this court's ruling in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), and in conflict with all other circuits.

IV. **The court of appeals' holding, that a district court has discretion to resolve ambiguities with respect to back pay in favor of a discriminating employer and to make assumptions unsupported by facts with respect to the effects of unlawful discrimination prior to the start of a class period, has the potential, if followed in future cases, to deny all class members in Title VII cases the "make whole" relief to which they are entitled and to undermine the utility of Title VII in protecting against discrimination in the workplace.**

ARGUMENT

The circuit court in *Pitre I* reversed the first remedy order because the district court had "disregarded earnings lost due to the lingering effects of past discrimination." 843 F.2d at 1278. On remand, it held, the district court "must . . . either attempt to account for the effect of past discrimination on the position of women at the beginning of the relevant period or explain why such consideration is unnecessary." *Id.* at 1279.

The underpinning for the conclusion that the district court had undervalued lost earnings lay in this passage from *Pitre I*:

> Although the adoption of Title VII did not require the immediate equalization of male/female disparity in upper level jobs, it is implicit in the district court's findings that in the decade

> before the slowdown requiring downgradings, Western Electric had the opportunity to promote more than two women to the position of section chief or to integrate the sexes more adequately in upper level positions. 843 F.2d at 1270-1 (p. 81a *infra*).[10]

In order to carry out its duty to make the class members whole for the harm actually suffered, the district court had to confront and resolve several ambiguities. Essentially these ambiguities dealt with (1) dividing the 1965-1974 promotion opportunities fairly among men and women so as to arrive at a model of Western Electric's workforce which would have existed at the time of the 1974 downsizing absent illegal discrimination; (2) apportioning the demotions and layoffs in the 1974-1976 period and the post-1976 promotions fairly; and (3) identifying and rectifying the economic harm (lost salaries) to the class. At each step, the district court made assumptions at odds with the record and its liability findings, and insulated the employer from the consequences of its illegal acts. The Tenth Circuit approved that approach on appeal the second time.

Neither the district court nor the court of appeals sought to explain why an employer who was found to have engaged in pervasive, continuing discrimination should have been given the benefit of assumptions made

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[10] *Cf. Teamsters v. United States*, 431 U.S. 324, 339 n. 20 (1977) ("[A]bsent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired").

to resolve important ambiguities and why the victims of discrimination should have been denied the benefit of the doubt with respects to ambiguities.

I. IN A CLASS ACTION CASE IN WHICH GENDER DISCRIMINATION WAS PROVED, THE LOWER COURTS MISAPPLIED THIS COURT'S RULING IN *ALBEMARLE PAPER CO. V. MOODY*, 422 U.S. 405, 418, 421 (1975), THAT REMEDIAL COMPENSATION FOR A LEGAL WRONG WHICH HAS BEEN DONE SHALL BE EQUAL TO THE INJURY, AND THAT DISCRIMINATION VICTIMS ARE ENTITLED TO THE MOST COMPLETE RELIEF POSSIBLE.

In *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975), this Court declared that a district court's remedy must be measured against the two purposes which inform Title VII, to eliminate the discriminatory effects of the past insofar as possible and to bar like discrimination in the future.

To that end, the *Albemarle* Court held, the district court "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future. * * * And where a legal injury is of an economic character, '[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury.' " *Id.* at 418. A remedy should be chosen which will "make persons whole for injuries suffered on account of unlawful employment discrimination," *id.*, and courts should strive to award *"the most complete relief possible."* *Id.* at 421 (emphasis added).

In *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976), the Court faced the question of awarding seniority as part of a remedy which included back pay. After examining the legislative history of the 1972 amendments to Title VII, the opinion explained:

> This is emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of . . . discrimination . . . . Adequate relief may well be denied in the absence of a seniority remedy slotting the victim in that position in the seniority system that would have been his had he been hired at the time of his application. It can hardly be questioned that ordinarily such relief will be necessary to achieve the "make-whole" purposes of the Act. *Id.* at 764-6.

This, too, is a "rightful place" case, although it involves promotions, demotions and layoffs rather than hiring. One major ambiguity is deciding the rightful place of groups of women (though not individual class members) as if discrimination had not occurred. Placing the victims in the position they would have had but for the discrimination carries with it an obligation to award back pay commensurate with salaries which would have been earned – *i.e.*, eliminating the earnings gap shown by the class to be the product of Western Electric's persistent discrimination. *Id.* at 767-8.

But the lower courts approved a remedy which does not afford the most complete relief possible. The lower courts resolved the "rightful place" ambiguity in favor of

the employer by a trickle up method. And far from eliminating the proven earnings gap, the back and front pay awards return about one-tenth of the actual salaries the class members as a whole have lost during the remedy period as a direct result of the employer's illegal acts. Allowing a proven discriminator to avoid accountability for most of the financial injury its acts and practices have caused is practically to reward it for breaking the law.

A Title VII remedy that does not serve the transcendent congressional purposes identified by this Court in *Albemarle* and *Franks*, if permitted to stand, sends a clear and ominous message to lower courts, employees and employers alike that illegal discrimination will be tolerated.

II. THE COURT OF APPEALS' HOLDING THAT THE DISTRICT COURT, WHICH FOUND GENDER DISCRIMINATION OVER A SUBSTANTIAL PERIOD OF TIME, HAD DISCRETION IN A TITLE VII CASE TO CHOOSE A REMEDY THAT RESOLVED AMBIGUITIES WITH RESPECT TO WHAT EMPLOYEES WOULD HAVE EARNED IN FAVOR OF THE DISCRIMINATING EMPLOYER AND TO REJECT THE REMEDY SUGGESTED BY THE INJURED EMPLOYEES WHICH WOULD HAVE RESOLVED THE AMBIGUITIES IN THEIR FAVOR IS IN CONFLICT WITH EVERY OTHER CIRCUIT THAT HAS ADDRESSED THE ISSUE.

In affirming the district court's remedial order in this case, the court of appeals held that the district court had discretion to adopt a remedy that resolved important ambiguities in favor of the employer, and to reject a

proposed remedy that would have fairly and equitably resolved the ambiguities in favor of the victims of discrimination. The court of appeals' decision is in conflict with every other circuit that has addressed this issue, all of which require that ambiguities be resolved in favor of the victims of discrimination. *See EEOC v. Enterprise Ass'n Steamfitters*, 542 F.2d 579, 587 (2nd Cir. 1976); *Hariston v. McLean Trucking Co.*, 520 F.2d 226, 233 (4th Cir. 1975); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260-1 (5th Cir. 1974); *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614, 628 (6th Cir. 1983); *Stewart v. General Motors Corp.*, 542 F.2d 445, 452 (7th Cir. 1976); *Wells v. Meyer's Bakery*, 561 F.2d 1268, 1273 (8th Cir. 1977); *Pitre v. Western Elec. Co., Inc.*, 843 F.2d 1262, 1277 (10th Cir. 1988); *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1563 (11th Cir. 1986).

If the decision below is permitted to stand, district courts will understand that their discretion has been expanded to permit them to favor employers who discriminate by resolving ambiguities in their favor and exercising discretion to reject remedies that would actually make victims whole.

The decision of the district court and the affirmance by the court of appeals could not have occurred in any other circuit which has ruled on the remedial power of a district court under Title VII. Not only does the approach of the lower courts in this case violate a fundamental principle in these other circuits – *i.e.*, victims who prove illegal discrimination have ambiguities resolved in their favor – neither the district court nor the court of appeals purports to explain or justify the perverse practice of giving an employer who discriminated the benefit of past

discrimination at the remedial stage of the case. The district court did not explain why it chose to reject the suggestions made by the class with respect to resolving ambiguities, and the court of appeals simply concluded that the district court had discretion with respect to a remedy without articulating any justification for resolving ambiguities as to lost pay against class members who established clear liability and who proved long-standing, insidious discrimination.[11]

III. THE LOWER COURTS ERRED IN APPROVING A REMEDY IN A CLASS ACTION DISCRIMINATION CASE WHICH GAVE THE DISCRIMINATING EMPLOYER THE BENEFIT OF TWO CRUCIAL ASSUMPTIONS WHICH WERE NOT SUPPORTED BY THE FACTS; AND THE APPROVAL OF SUCH A REMEDY IS INCONSISTENT WITH THIS COURT'S RULING IN *ALBEMARLE PAPER CO. V. MOODY*, 422 U.S. 405 (1975), AND IN CONFLICT WITH ALL OTHER CIRCUITS.

A district court's discretion to choose among alternatives in fashioning a Title VII remedy is not unlimited; the court is required to make a "principled application of standards consistent with [congressional] purposes. *Albemarle Paper Co. v. Moody, supra* 422 U.S. at 417. A court is not free to adopt a remedial scheme which on its face

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[11] The failure of the lower courts to resolve ambiguities for the injured class members in this particular case is especially odd in view of the fact that Western Electric conceded in the district court that it owed more back pay than the district court awarded. *See* p. 13 *supra*.

gives an employer the benefit of past discrimination, especially when an alternative remedial scheme is available which provides fair and equitable relief to injured employees. A court lacks the power to deny full compensation to the employees.

The district court built its remedy upon two crucial assumptions which were not supported by the facts – that the appropriate promotion pool to each grade consisted of employees in the next lower grade, even though company records showed that promotion commonly was made by skipping grade levels; and that the substantial earnings gap between class members' earnings and male employee earnings between 1973 and 1981 was not remediable.

The cases cited at page 19 *supra* demonstrate that in every other circuit that has ruled on a district court's remedial authority (and in the Tenth Circuit under *Pitre I* as well), the two assumptions made by the district court would have been clearly forbidden because they resolved ambiguities in favor of the employer rather than the injured employees. These cases conclusively demonstrate that it is impermissible for a district court or a court of appeals to reject a remedial approach suggested by the injured employees when that approach resolves ambiguities in their favor and is supported by the record in the case, and to make assumptions about employment histories that resolve ambiguities to the employer's benefit. Thus, there is a conflict between the decisions below in this case and the cases previously cited.

There is also a direct conflict between the decisions below and cases decided by the United States Courts of

Appeals for the District of Columbia Circuit and the Eighth Circuit – *see Thompson v. Sawyer*, 678 F.2d 257 (D.C.Cir. 1982); *McKenzie v. Sawyer*, 684 F.2d 62 (D.C.Cir. 1982); and *Hameed v. Intern. Ass'n of Bridge, Etc.*, 637 F.2d 506 (8th Cir. 1980). These circuits recognized that the remedy suggested by the class in the instant case is a fair way to resolve ambiguities concerning promotion denials and lost pay in situations where a workforce is comprised of approximately equal numbers of men and women, because it is fair and equitable to assume that half of all promotions or salaries at various levels would have gone to women and half to men. Two of these cases were cited by the court of appeals in *Pitre I*, but were totally ignored by the same court as it affirmed the district judge's decision to adopt a different remedy. The court of appeals' approval of the district court's remedy conflicts with the decisions of these other circuits, and does not offer a single justification for rejecting the approach taken by the D.C. and Eighth Circuits which is nothing more than a specific application of the general principle that victims of discrimination must receive the benefit of the doubt with respect to ambiguities.

Promotions. The actual number of promotion opportunities facing Western Electric for the period from July 1965 through mid-1974 was known to the district court: 40 openings at section chief, 32 at D-7/D-8/M-50, and 68 at D-6/D-7/M-40. After 1976, there were 16 more vacancies at section chief, 12 at M-50, and 8 at M-40.

The district court essentially exercised its discretion under the hypothetical construct to continue the discriminatory promotion practices of Western Electric – *i.e.*,

"promoting" women up the salary grades and into management at a snail's pace. Restricting the pool of candidates to the next lower level when calculating hypothetical promotions from 1966 through 1980 assured the class that their movement up the salaried ranks and into management would be greatly delayed under the district court's remedial order.[12] Thus the court's "expected" number of promotions was artificially lower and "expected" number of demotions higher, resulting in lower back and front pay amounts.

The district court refused to assume, *for remedy purposes*, that half of all promotions since 1965 would have gone to women. In doing so, it rejected the assumption deemed "reasonable" in *Thompson v. Sawyer*, *supra* 678 F.2d at 292; *see also McKenzie v. Sawyer*, *supra* 684 F.2d 62, and *Hameed v. Intern. Ass'n of Bridge, Etc.*, *supra* 637 F.2d at 520-1.[13] The assumption of parity suggested by the class would have deprived Western Electric of the benefit of the discrimination which the lower courts found it had engaged in even before 1965. It was fair and reasonable and gave the plaintiff class the benefit of the ambiguity in

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[12] By 1981, the district court "promoted" only 12.69 women to supervisor, even though the employer actually had 46 promotion opportunities between 1965 and 1981. Western Electric had in fact promoted six women into management during that span (including Ms. Pitre who was demoted in 1975 but never restored to section chief).

[13] *Cf. United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558-9 (1977) (noting difference between remedy analysis and liability analysis).

attempting to determine the manner in which promotions since 1965 would have been made absent discrimination.

Because the district court rejected the plaintiff's approach and erroneously paralleled the actual discriminatory promotion and demotion practices of Western Electric, the court's entire reconstruction of employment history for back pay purposes understated the loss to the plaintiff class. The understatement carried over to front pay as well, because front pay is a continuation of monetary damages until injured parties are hired or promoted. If back pay is understated, front pay will be also under the flawed approach of the district court. Thus Western Electric reaps the benefit of its discriminatory policies and practices.

The Economic Injury. Western Electric has not disputed, and neither the district court nor the Tenth Circuit rejected, the class' argument that the company's refusal to promote women during the 1960's and 1970's kept them clustered in the lower salary levels and artificially created a substantial earnings gap between men and women which has persisted throughout the past 25 years. By freezing women out of the higher positions in the 1960's and early 1970's, Western Electric created the conditions whereby its demotion procedure would favor males and disfavor females when the economy suffered a downturn. Additionally, Western Electric pursued salary, assignment and overtime policies throughout the 1970's which favored men over women and exacerbated the earnings gap.

If by 1974 women had been represented in each level in numbers commensurate with their distribution in the

salary grades as a whole, they would have earned approximately that same percentage of all salaries paid by the company (the remedy proposal urged by the class). A fair and non-discriminatory reduction in force would have fallen about equally on men and women, and a fair promotion policy after 1976 would have benefitted them equally. Those factors, combined with a fair parceling out of overtime assignments and abandonment of salary protection measures favoring males, would have meant reasonable job security and salary stability for women throughout the 1970's.

When the court of appeals remanded this case in *Pitre I*, it acknowledged that the district court had failed to account sufficiently for past discrimination. The remand reasonably assured that, once the effects of discriminatory promotion decisions in the 1960's and 1970's were corrected, there would be a greater back pay recovery for the class (843 F.2d at 1278; pp. 100a-101a *infra*). But on remand, the district court, without even holding a hearing, exercised its discretion to resolve all ambiguities in favor of Western Electric, and to reward it for its illegal promotion practices predating the EEOC charge. The greater impact on women of the demotions and layoffs from 1974 through 1976, and the unfairness of the reupgrading process after 1976, were undoubtedly a consequence of promotion denials in prior years, an exacerbation of the daily harm. While these illegal decisions predating December 1974 were not actionable (because no timely charge of discrimination was filed as to them), they are of the same kind and character as those for which Western Electric was found liable. Thus the

adverse effects felt by the class since June 1973 are remediable because the company is a proven discriminator under Title VII. 42 U.S.C. § 2000e-5(g); *Thompson v. Sawyer, supra* 678 F.2d at 290-1. The court of appeals recognized this in *Pitre I.*

Yet, when the plaintiff appealed to the court of appeals a second time, that court held that "[w]e find no abuse of discretion in the district court's selection on remand of the method by which it calculated back and front pay." 975 F.2d at 704 (p. 6a *infra*). The court of appeals added that "[w]e stated in *Pitre I* that the court could again compare promotions that should have gone to women with those that women actually received *so long as the lingering effects of past discrimination were taken into account.*" *Id.* (emphasis added). Thus, in the instant case the court of appeals held that a district judge has discretion to take the lingering effects of past discrimination into account by resolving all doubts in favor of the employer who discriminated, whereas all other circuit decisions require that the doubts be resolved in favor of the employee victims. And, other circuits have recognized a relatively simple and clearly equitable method for resolving doubts in favor of employees in a case like this – *i.e.*, assuming that men and women would have been treated approximately the same when each group comprises approximately 50% of the workforce.

Thompson v. Sawyer, supra 678 F.2d 257, was one of the first circuit decisions to recognize the phenomenon of "compounded effects" of discrimination occurring over a

long period of time. *Id.* at 290.[14] The "make whole" objective of Title II demands full compensation for these compounded effects ("Lost pay, lost pension rights, lost benefits, or lost seniority must all be rectified, if they result from illegal discrimination"). *Id.* The *Thompson* Court discerned a clear congressional purpose that proven discriminators not be "insulate[d] from liability for the latent effects of previous illegal discrimination." *Id.* at 290-1. *Cf. Albemarle Paper Co. v. Moody, supra* 422 U.S. at 417-8 (deterrent value of back pay award).

The Tenth Circuit discussed *Thompson* and *Segar* with unqualified approval in *Pitre I.* 843 F.2d at 1278. Yet on the second appeal, the court of appeals allowed the district court the discretion to assume that promotion criteria were more burdensome for women than the employer's actual practice, and affirmed a remedy order which vastly undercompensates a class for salaries proven to have been lost because of illegal discrimination.

It is important for Title VII cases that district court discretion be properly limited so that victims of discrimination are not deprived of a complete remedy on the basis of unsupported assumptions favoring an employer who has discriminated.

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[14] *Accord, Segar v. Smith,* 738 F.2d 1249, 1291 (D.C.Cir. 1984), *cert. denied,* 471 U.S. 1115 (1985).

IV. THE COURT OF APPEALS' HOLDING, THAT A DISTRICT COURT HAS DISCRETION TO RESOLVE AMBIGUITIES WITH RESPECT TO BACK PAY IN FAVOR OF A DISCRIMINATING EMPLOYER AND TO MAKE ASSUMPTIONS UNSUPPORTED BY FACTS WITH RESPECT TO THE EFFECTS OF UNLAWFUL DISCRIMINATION PRIOR TO THE START OF A CLASS PERIOD, HAS THE POTENTIAL, IF FOLLOWED IN FUTURE CASES, TO DENY ALL CLASS MEMBERS IN TITLE VII CASES THE "MAKE WHOLE" RELIEF TO WHICH THEY ARE ENTITLED AND TO UNDERMINE THE UTILITY OF TITLE VII IN PROTECTING AGAINST DISCRIMINATION IN THE WORKPLACE.

The broad remedial purposes of Title VII – eliminating the discriminatory effects of the past insofar as possible and barring like discrimination in the future – have not been served by the remedy ordered in this case. The danger in allowing it to stand threatens many more than the 84 class members in the instant case.

In ignoring this Court's directions in *Albemarle* and *Franks* that courts must fashion the most complete relief possible in order to make victims whole, the court of appeals has approved an approach that will have applicability in every class action employment discrimination case. Because class action discrimination cases generally arise after a pattern or practice of discrimination can be observed and proved, the filing of a suit almost always will occur after a substantial period of discrimination has occurred that is not compensable under Title VII. To assure, however, that the "make whole" remedy of Title VII can be achieved, it is essential that both back and

front pay be computed by making the employer financially accountable for its historical acts of discrimination and awarding back and front pay by determining the full nature and extent of the economic harm to the class throughout the class period, with all ambiguities resolved in favor of the employee victims.

CONCLUSION

The remedy chosen by the district court and approved by the circuit court is so far contrary to the congressional purposes underlying Title VII and to the make-whole principle of *Albemarle* and other Supreme Court decisions, so inconsistent with decisions from the other circuit courts, and so undermines the effectiveness of Title VII as a remedy against proven discrimination and a deterrent against future illegality that it is deserving of this Court's review. Petitioner respectfully urges the Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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The ESTATE of Janice D. PITRE, individually and on behalf of all fellow employees and past employees of the defendant who are similarly situated, Plaintiff-Appellant/Cross-Appellee,

v.

WESTERN ELECTRIC CO., INC., Defendant-Appellee/Cross-Appellant.

Nos. 90-3152, 90-3164.

United States Court of Appeals, Tenth Circuit.

Sept. 14, 1992.

Steven L. Hobson (Ronald J. Stites, with him on the brief), of Stites, McIntosh & Knepper, Kansas City, Mo., for plaintiff-appellant.

Jack L. Whitacre (Stanley E. Craven, with him on the brief), of Spencer Fane Britt & Browne, Kansas City, Mo., for defendant-appellee.

Before SEYMOUR, BARRETT, and BRORBY, Circuit Judges.

SEYMOUR, Circuit Judge.

Janice Pitre brought this suit individually and on behalf of a class of similarly situated employees under 42 U.S.C. §§ 2000e *et seq.* (1988) (Title VII) against Western Electric Co., Inc., asserting that the company had engaged in a continuing practice of sex discrimination with respect to promotions and downgrades of its salaried employees. The district court found the company liable and awarded Pitre and the class back pay, front pay, and injunctive relief. On appeal, this court affirmed the finding of liability but reversed the awards of back pay and

front pay to the class and remanded for the district court to fashion new class remedies in light of our opinion. *See Pitre v. Western Elec. Co.*, 843 F.2d 1262 (10th Cir.1988) (*Pitre I*). The district court reformulated the amount of back pay and front pay by modifying its earlier approach in response to the errors we set out in *Pitre I*. *See Estate of Pitre v. Western Elec. Co.*, 719 F.Supp. 966 (D.Kan.1989) (*Pitre II*). Both parties have again appealed. We affirm in part, reverse in part, and remand for further proceedings.

I.

The relevant facts and the prior course of this litigation have been exhaustively detailed in the opinions cited above. We therefore repeat only the background necessary to a consideration of the issues raised in this appeal.

In its first calculation of damages, the district court determined the number of women in each salary level that would have been promoted, downgraded, or laid off absent discrimination by using the percentage of women in each promotion or downgrade pool at the beginning of the back pay period. The court compared that figure with the number of women who were actually promoted, downgraded, or laid off. This difference was then translated to a back pay award by using the difference between the average earnings of men in the higher level and the average earnings of women in the lower level. In so doing, the court assumed that promotions were made only from the next lower level rather than from all lower levels. The district court recognized that using the actual work force in place at the beginning of the back pay period produced a lower back pay award than would

have resulted by using a work force from which the effects of discrimination prior to this period had been factored out. However, the court stated its belief that this discrepancy could be remedied by awarding front pay. The court accordingly awarded front pay to continue until women comprised fifty percent of each salary level.

In the first appeal, we concluded that the district court had not adequately accounted for the lingering effects of discrimination in determining the amount of back pay. *Pitre I*, 843 F.2d at 1278.[1] We rejected the court's attempt to remedy inadequate back pay with front pay, pointing out that front pay is a supplement to back pay, not a substitute for it. *Id.* at 1279. In remanding, we stated that the lower court was "free to consider any method of determining the appropriate amount of back and front pay to which the class is entitled." *Id.* However, we pointed out that

> [b]y not using the women's current position in the company, the effects of past discrimination may be more fully incorporated into the formula. In principle, the district court's method of calculating the promotions that should have gone to women with those that actually did go to women could again be used. The court must, however, either attempt to account for the effect of past discrimination on the position of women at the beginning of the relevant period or explain why such consideration is unnecessary.

Id.

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[1] We also held that the district court erred in determining the method of distributing the back pay award. That matter was satisfactorily resolved on remand and is not at issue in this appeal.

On remand, the district court again calculated the amount of back and front pay by comparing the promotions and downgrades that actually went to women with those that should have gone to women. In order to address its earlier failure to adequately allow for the cumulative effects of defendant's past discrimination, however, the court developed a "hypothetical workforce which would have been in place at the end of 1974[2] if the defendant had not discriminated against women in promotions and downgrades between 1965 and 1974." *Pitre II*, 719 F.Supp. at 971. In making comparisons, the court used this hypothetical 1974 work force, which attempted to eliminate the past discrimination, rather than the actual 1974 work force that the court had used previously, which embodied the effects of this discrimination. The court also awarded front pay to continue until women made up fifty percent of each salary level.

Both parties have again appealed. Plaintiff takes issue with the district court's method of calculating back and front pay, arguing that the court did not provide the most complete relief possible and did not adequately address the cumulative effects of defendant's past discrimination. In plaintiff's view, a proper back pay award should equal the difference between the total salary actually paid to women in salaried positions, and the percentage of the total salary paid to all salaried workers that

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[2] Pitre filed her discrimination charge on June 2, 1975. The district court held that the relevant period for purposes of calculating back pay began on December 11, 1974, 180 days before the date the charge was filed. We address the propriety of using this period in our opinion *infra*.

women were proportionally entitled to receive. Thus, if women made up fifty percent of all salaried workers, they should receive fifty percent of the total salary less what they were actually paid. Plaintiff contends alternatively that, in constructing its hypothetical work force, the court erred in assuming that the proper promotion pool consisted of only the next lower level rather than all lower levels. Plaintiff argues that this alleged error resulted in an under-representation of women in the higher levels and a corresponding reduction in the number of promotions for which women received back pay. Plaintiff also contends that the lower court erred by awarding back pay only for the 180-day period prior to date on which plaintiff Pitre filed her charge, rather than using the two-year period set out in 42 U.S.C. § 2000e-5(g). Finally, plaintiff asserts that these alleged errors also infected the court's front pay award. In plaintiff's view, front pay should continue until women have received half of all promotions since 1965.

Defendant contends that the district court erred in failing to use a promotional pool that included hourly employees and other ungraded salaried employees who were not members of the plaintiff class. Defendant also takes issue with the court's decision to award front pay, and to continue that award until women make up half of each salary level.

II.

We begin our consideration of these arguments by noting, as we did in *Pitre I*, that considerable discretion is vested in the district court when devising remedies for

Title VII violations. *See generally Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416-422, 95 S.Ct. 2362, 2370-74, 45 L.Ed.2d 280 (1975). We also observe as we did earlier, however, that the district court's exercise of discretion in awarding back pay must be "measured against the purposes which inform Title VII." *Id.* at 417, 95 S.Ct. at 2371. Those purposes require a remedy that both provides an incentive to employers to avoid discriminatory practices, *id.* at 417-18, 95 S.Ct. at 2371-72, and makes "persons whole for injuries suffered on account of unlawful employment discrimination," *id.* at 418, 95 S.Ct. at 2372. Upon reviewing the district court's exercise of discretion on remand, all but one of the arguments raised in this appeal are easily resolved.

We find no abuse of discretion in the district court's selection on remand of the method by which it calculated back and front pay. We stated in *Pitre I* that the court could again compare promotions that should have gone to women with those that women actually received so long as the lingering effects of past discrimination were taken into account. *See Pitre I*, 843 F.2d at 1279. In choosing to use this comparison method, as modified, the district court rejected plaintiff's argument that women should instead receive their proportional share of the total amount of salaries, pointing out that

> [a]t issue in this action are a finite number of identifiable decisions by the defendant regarding promotions and downgrades. We should focus these specific decisions and award the plaintiff damages when there is discrimination, rather than simply determining whether women received a pro rata portion of all salaries paid.

Pitre II, 719 F.Supp. at 970. We view this as an acceptable approach to the court's duty to provide compensation equal to the injury. *See Albemarle*, 422 U.S. at 418-19, 95 S.Ct. at 2372 (quoting *Wicker v. Hoppock*, 73 U.S. (6 Wall.) 94, 99, 18 L.Ed. 752 (1867)).

We likewise find no merit in both parties' objections to the district court's use of only the next grade as the promotion or downgrade pool in making comparisons. We held in *Pitre I* that the court's decision to calculate the amount of back pay on a step-by-step basis was not clearly erroneous, stating that although the district court was free on remand to reconsider its decision to assume that promotions would proceed one grade at a time, the court was not required to do so. *See* 843 F.2d at 1279 n. 11. Nothing presented in this appeal convinces us to disturb our prior ruling.

Equally unpersuasive are defendant's arguments with respect to front pay. We stated in *Pitre I* that the district court's decision to grant front pay was not an abuse of discretion. *Id.* at 1276. On remand, the court again concluded that front pay was appropriate and ordered it to continue until women comprised fifty percent of each salary level. The court was unpersuaded by defendant's argument that because promotion opportunities were virtually nonexistent, defendant was in effect precluded from ending its front pay liability. The court pointed out that "the lingering effects of past discrimination will continue to be felt until women constitute half of the work force for [a given] level." *Pitre II*, 719 F.Supp. at 974. The court preferred to place "the hardship

of the present impossibility of correcting past discrimination on the defendant, the party found to have discriminated, rather than on the plaintiff, the victim of the discrimination." *Id.* The court's reasoning clearly implements both the deterrent and the "make whole" purposes of Title VII and accordingly is a proper exercise of discretion. *See Albemarle,* 422 U.S. at 419, 95 S.Ct. at 2372.

Finally, we address plaintiff's argument with respect to the appropriate period for purposes of computing back pay. Plaintiff contends that the district court should have calculated the amount of back pay on the basis of the two-year period provided by 42 U.S.C. § 2000e-5(g), rather than the 180-day period set out in 42 U.S.C. § 2000e-5(e). Although both of these periods are measured by the date a discrimination charge is filed with the EEOC, the periods serve different functions in the Title VII process. Section 2000e-5(e) establishes the limitation period for filing a discrimination charge with the EEOC, and requires that this charge must be filed "within one hundred and eighty days after the alleged unlawful employment practice occurred." *Id.* Claims based on events occurring prior to this 180-day period are ordinarily considered time-barred. Section 2000e-5(g), on the other hand, sets out the relief a district court may order upon a finding of discrimination, and provides *inter alia,* that "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission." *Id.*

To establish substantive liability, a plaintiff must prove that at least one discriminatory act occurred within the 180-day period for filing a charge with the EEOC. *See Furr v. AT & T Technologies, Inc.,* 824 F.2d 1537, 1544 (10th

Cir.1987). That showing has clearly been made in this case. Once liability has been established, section 2000e-5(g) authorizes a district court to award back pay for the two-year period prior to the date the EEOC charge was filed. The court thus may award back pay measured by the two-year period of section 2000e-5(g) to remedy discriminatory *acts that occur within* the 180-day period of section 2000e-5(e).

In addition, this court has recognized the continuing violation theory, under which a district court may, in the requisite circumstances, provide a remedy for discriminatory *acts occurring prior* to the 180-day period of section 2000e-5(e). If the plaintiff establishes a pattern of continuing discrimination beginning before the 180-day period and extending into that period, the plaintiff may recover for those earlier acts.

> Plaintiffs may bring suit for one or more discriminatory acts occurring before the limitations period, and may recover damages based on those injuries "*if* the plaintiff can demonstrate that the practice has actually continued into the 'present' – that is, into the time period relevant to the date the charge of discrimination was filed. At least one discriminatory act must have occurred within the charge-filing period."

Furr, 824 F.2d at 1544 (*quoting Stewart v. CPC Int'l, Inc.*, 679 F.2d 117, 121 (7th Cir.1982); *see also Allen v. Denver Pub. Sch. Bd.*, 928 F.2d 978, 984 (10th Cir.1991).[3]

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[3] Damages under the continuing violation theory are, of course, subject to the two-year back pay limit provided by section 2000e-5(g). *See McKenzie v. Sawyer*, 684 F.2d 62, 72 n. 8 (D.C.Cir.1982).

Plaintiff argued in the first appeal to this court that the district court erred by awarding damages measured only by the 180-day period of section 2000e-5(e). Although plaintiff argued to the district court on remand that damages should be calculated on the basis of the two-year period, the court without explanation failed to do so. Defendant contends that the district court's actions were not an abuse of discretion, asserting that this court in *Pitre I* implicitly approved the district court's use of the shorter period. We disagree. We simply did not address the issue in view of our general remand to allow the district court to reformulate its award under "any method" that accounted for the lingering effects of past discrimination. *Pitre*, 843 F.2d at 1279.

While recognizing that a plaintiff who establishes a continuing violation may recover for events occurring during the two-year period, Brief of Defendant-Appellee at 31, defendant makes an unfocused argument that to permit this recovery here would be inequitable. In support of its equity argument, defendant asserts that until plaintiff filed an amended complaint adding the class action, defendant had no notice that these acts would be the subject of a claim for relief because the original EEOC investigation focused only on the claim of the individual plaintiff. We do not find this argument persuasive, especially when defendant did not raise it at the appropriate time. We find no indication in the record on appeal that defendant opposed adding the class claims because they were so unrelated to the individual claim that a new EEOC charge was required. By failing to argue then that the class claims were different enough to require exhaustion, defendant has waived the argument now that the

claims cannot therefore be fully remedied, particularly given the " 'generally accepted principle that the scope of a Title VII lawsuit may extend to "any kind of discrimination like or related to allegations contained in the charge." ' " *Nealon v. Stone*, 958 F.2d 584, 590 (4th Cir.1992) (quoting *Hill v. Western Elec. Co.*, 672 F.2d 381, 390 n. 6 (4th Cir.), *cert. denied*, 459 U.S. 981, 103 S.Ct. 318, 74 L.Ed.2d 294 (1982)); *see also Brown v. Hartshorne Pub. Sch. Dist. No. 1*, 864 F.2d 680, 682 (10th Cir.1988).

Accordingly, defendant has not demonstrated in this appeal inequity that would preclude the district court from awarding damages under a continuing violation theory. This court, the district court, and the parties have all proceeded, until this late date, on the understanding that plaintiff's claims rest on a continuing violation theory. *See Furr*, 824 F.2d at 1544 (rejecting similar argument for same reasons). Indeed, the district court's creation of a hypothetical work force in its method of calculating damages is necessary precisely because of defendant's continuing practice of discrimination, which the court found to have existed in 1965 and to have continued into the 180-day filing period.

In addition, we observe that a plaintiff need not establish a continuing violation in order to receive damages for the two-year period. Section 2000e-5(g) authorizes the district court in its discretion to make such an award to any Title VII plaintiff. The discretion granted to district courts in awarding remedies for Title VII violations was intended by Congress "to make possible the 'fashion[ing] [of] the most complete relief possible.' " *Albemarle*, 422 U.S. at 421, 95 S.Ct. at 2373. "[B]ackpay

should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Id.* Here, the district court did not award damages for the entire period authorized by Title VII and did not provide reasons for its failure to do so. If a district court declines to award back pay, "it [must] carefully articulate its reasons," *id.* at 421 n. 14, 95 S.Ct. at 2373 n. 14, so as to enable the court of appeals to test them against the purposes of Title VII, *see id.* at 421-22, 95 S.Ct. at 2373-74.

Accordingly, we must remand for the limited purpose of allowing the district court to address its failure to award back pay for the entire two-year period prior to the date the EEOC charge was filed. The court should either adjust its award or articulate its reasons for declining to do so. In ordering this limited remand, we emphasize that the only issue to be considered is the appropriate back pay period. We otherwise find no error or abuse of discretion in the remedies so carefully devised by the district court.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings in light of this opinion.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THE ESTATE OF JANICE D. PITRE, individually and on behalf of all fellow employees and past employees of the defendant who are similarly situated,	)	
Plaintiff - Appellant/ Cross-Appellee,	)	Nos. 90-3152 90-3164
v.	)	
WESTERN ELECTRIC CO., INC.,	)	
Defendant - Appellee/ Cross-Appellant.	)	

ORDER

Entered June 22, 1993

Before McKAY, Chief Judge, and BARRETT, LOGAN, SEYMOUR, MOORE, ANDERSON TACHA, BALDOCK, BRORBY, EBEL and KELLY, Circuit Judges.

This matter comes on for consideration of plaintiff/appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are

in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By: /s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

The ESTATE OF Janice D. PITRE, individually and on behalf of all fellow employees and past employees of the defendant who are similarly situated, Plaintiffs,

v.

WESTERN ELECTRIC COMPANY, INC., Defendant.

Civ. A. No. 76-218-C2.

United States District Court,
D. Kansas.

July 10, 1989.

Steven L. Hobson, Ronald J. Stites and Sandra Midkiff, Kansas City, Mo., and Michael E. Callen, Kansas City, Kan., for plaintiffs.

Spencer, Fane, Britt & Browne, Jack L. Whitacre, Stanley E. Craven and Georgann H. Eglinski, Kansas City, Mo., and Lawrence Ferree, Overland Park, Kan., for defendant.

MEMORANDUM AND ORDER

EARL E. O'CONNOR, Chief Judge.

This aged case comes before the court for a determination of damages. The plaintiff[1] brought this action individually and on behalf of a class of women

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[1] Janice D. Pitre, the original plaintiff in this action, is deceased. Her estate has been substituted.

employees, alleging gender-based discrimination in violation of 42 U.S.C. § 2000e *et seq.* (Title VII). In an order dated August 9, 1983, (liability order) the court found that the defendant was liable to the plaintiff and the class. "Plaintiff" hereafter refers to the class as certified, which includes "all female employees of [the defendant] in positions ranging from grades M-10 through M-50 and in the position of section chief, who have been discriminated against in assignment, promotion, or downgrading, and who have been employed at defendant's facilities in Merriam and Lenexa, Kansas, after December 11, 1974)." We addressed the issue of damages in orders dated December 14, 1984, (damages order) and April 23, 1985, and a judgment was entered on June 20, 1985 (damages judgment). The defendant appealed our determination of liability, and both parties appealed the remedies as to the class. The Tenth Circuit affirmed our liability findings, but reversed and remanded the case for reconsideration of the remedy. *Pitre v. Western Electric Co.*, 843 F.2d 1262, 1264 (10th Cir.1988). We directed the parties to attempt to reach an agreement as to the remedy in light of the circuit's opinion, but they were unable to do so. Having received the parties' proposed findings of fact and conclusions of law on the remedy issue, the court is prepared to rule.

Initially, we briefly examine our determination on liability, which was affirmed by the Tenth Circuit.[2] Next, we focus on our earlier order on damages, and the Tenth

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[2] We will restate in a cursory manner the facts underlying this lawsuit. We make no new findings, as our recall of the facts was much more vivid when our liability order was entered.

Circuit's reversal of that order. Finally, we tailor a new remedy in light of the circuit court's opinion.

I. *The Prior Opinions.*

A. The Liability Order.

The defendant's work force includes three types of employees: (1) hourly employees, which are blue-color [sic] workers, (2) salary-graded employees, which are white-color [sic] office employees classified in five grades from M-10 to M-50, and (3) management, the lowest grade of which is section chief. At issue in this case is the distribution of employees in grades M-10 through M-50 and in the section chief position.

Prior to the passage of Title VII in 1964, the defendant openly discriminated against women in terms of employment and advancement. In fact, the defendant's treatment of women in the work force did not begin to improve until the late 1960's and early 1970's, and throughout the 1970's, discrimination continued. In the early 1970's, women who were salary-graded employees were clustered in the lower classification levels. As we stated in the liability order:

> The net effect of the past discriminatory practices and the more recent fact that promotion decisions were being made by male section chiefs, resulted in more women remaining in the lower levels of the salary-graded employee plan. Specifically, distributions of males and females in the salary-graded universe and the management level at Merriam and [(one of the two facilities involved in this action)] on December 31, 1974, were as follows:

	Males		Females	
	No.	%	No.	%
Manager	1	100	0	0
Asst. Manager	2	100	0	0
Dept. Chief	10	100	0	0
Section Chief	39	95	2	5
M-50	24	92	2	8
M-40	16	57	12	43
M-30	4	17	19	83
M-20	4	31	9	69
M-10	2	11	17	89

Liability Order at 21 (the table above is presented differently than was the table in the liability order, but the numbers are the same).

In 1975, the defendant reorganized management because of a decline in business, and some salary-graded employees were downgraded or laid off. The downgradings disproportionately affected women in each M-level category. No salary-graded employees were promoted from June 1974 to June 1976. When promotions resumed, the defendant generally followed a policy of upgrading employees to their former M-level classifications in the order in which they were downgraded, but men did get some significant promotions ahead of women.

Given the evidence presented at trial, we concluded that

> [t]he examples of preferential treatment of men over women were not merely isolated instances or "accidental in nature," but were so pervasive throughout the Merriam and Lenexa facilities that the only rational conclusion to be reached is that defendant practiced sex discrimination with respect to salary-graded women.

Liability Order at 31. Specifically, we found that the defendant discriminated against the class with respect to (1) downgradings and layoffs from December 11, 1974, through 1976, and (2) promotions since 1976. *See* Damages Order at 1. As stated above, the Tenth Circuit affirmed our liability determination.

B. The Damages Order.

After finding liability, we attempted to formulate an appropriate remedy. We recognized that the remedy should, "as nearly as possible, 'recreate the conditions and relationships that would have been had there been no' unlawful discrimination." *Teamsters v. United States*, 431 U.S. 324, 371-72, 97 S.Ct. 1843, 1872-73, 52 L.Ed.2d 396 (1976) (quoting *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 769, 96 S.Ct. 1251, 1266, 47 L.Ed.2d 444 (1976)). However, we also noted that given the facts herein, a determination of the individuals who would have been promoted absent discrimination is impossible. Thus, we used a formula approach to determine back pay. Damages Order at 2-3.

First, we focused on the formula for back pay for promotions which women were wrongfully denied in a given year. We held that calculations of back pay for each level from M-20 to section chief should be made by multiplying the percentage of women in the promotion pool (those persons in the next lower M-level category) by the number of promotions (of men and women) to the level given that year, and then subtracting from this figure the number of promotions actually given to women in that year. The resulting figure is the number of

women who were wrongfully denied promotions. Further, we stated that after the calculations for a given year are completed, the subsequent years' figures should be determined using the fictional numbers of women that would be at each level had there been no discrimination. Damages Order at 4.

Second, we focused on a formula for back pay for downgradings and layoffs which resulted from discrimination. We determined that the percentage of women in the relevant pool (those persons in the M-level from which the downgrades or layoffs were made) should be multiplied by the number of downgrades or layoffs (of men and women) actually occurring in the relevant year. This figure should be subtracted from the number of women actually downgraded or laid off, with the resulting figure being the number of women who were wrongfully downgraded or laid off.

To determine back pay for wrongfully denied promotions or for wrongfully [sic] downgrades or layoffs, the court used the difference between (1) the average earnings of males in the higher M-level category and (2) the average earnings of females in the lower M-level category.

Third, the court examined the issue of front pay, stating that the defendant's discrimination had resulted in a clustering of women at lower M-level categories, and that the "class will not be afforded complete relief unless the court grants front pay to the class to continue until women constitute an appropriate percentage of the employees at all levels, M-10 through section chief." Damages Order at 6. We stated:

We could have gone back to 1965 (when Title VII became effective) and determined the number of promotions discriminatorily denied women between 1965 and 1974 (the starting date for back pay calculation). See Thompson v. Boyle, 499 F.Supp. 1147 (D.D.C.1980), *modified sub nom. Thompson v. Sawyer,* 678 F.2d 257 (D.C.Cir.1982) (citing *Salone v. United States,* 645 F.2d 875 (10th Cir.), *cert. denied,* 454 U.S. 894 [102 S.Ct. 390, 70 L.Ed.2d 208] (1981)). *This method would have resulted in the number of women that should have been at each level by 1974 in the absence of discrimination.* Because a greater number of women would have been at the higher levels, a greater back pay recovery for the class would result for the years 1974 through 1982. *Id.*

* * *

In recognition of the inequity dicussed [sic] in *Thomson [Thompson] v. Sawyer,* and in order to fully compensate the class, we have decided that front pay is appropriate in this case. It can be assumed that in the absence of discrimination, women would comprise approximately the same percentage at each level as that of the available workforce. Therefore, one would expect that in time women would represent at least fifty percent of each M level. It follows that front pay should continue until women comprise fifty percent of each M level and the Section Chief level. The defendants, therefore, will have a large degree of control over how long front pay continues, and this method will make up for the inequities inherent in a back pay formula that does not take into account the effects of past discrimination. *We have chosen to allow front pay in this manner rather than calculating back pay by*

> *taking into account events occurring back to 1965. This method better serves the purposes of Title VII.* Front pay in this case will have the effect of moving women into the higher levels rather than merely compensating them for discrimination in the past. Back pay for only a few of those years of discrimination, without restoring women to their rightful places, would not fully compensate the plaintiff class.

Damages Order at 6-8 (emphasis added).

Fourth, we allowed prejudgment interest, and granted injunctive relief. Based on our findings in the damages order, the parties drafted and the court approved the damages judgement.

C. The Tenth Circuit's Opinion.

The Tenth Circuit reversed and remanded, finding error in our remedy. *Pitre*, 843 F.2d at 1264. The circuit court found that a group remedy, determined by formula, was appropriate. *Id.* at 1275-76. It further found that our determination to grant back pay, front pay, and injunctive relief was proper. *Id.* at 1276. However, the circuit court found that our remedy failed in two manners to adequately consider the effects of past discrimination: First, we inadequately accounted for the lingering effects of past discrimination in determining the amount of back pay. *Id.* at 1278. Second, we insufficiently considered the effects of past discrimination in determining how to distribute the back pay award. *Id.* at 1279.

As to the amount of back pay, the Tenth Circuit described the cumulative effect of discrimination in the promotion process, stating that "[d]enial of promotion to

one grade affects the [employee's] eligibility for later promotions to higher grades." *Id.* at 1278 (quoting *Segar v. Smith*, 738 F.2d 1249, 1291 (D.C.Cir.1984), *cert. denied*, 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985)). The circuit court stated that we recognized this proposition, but that we had nonetheless failed to fully account for the cumulative effects of discrimination in our back pay award. *See id.* at 1278 (focusing on the above-quoted language from our damages order). The circuit court stated:

> It is apparent from the quoted statements that the district court believed front pay would in part replace back pay. However, front pay is intended to compensate victims of discrimination for continuing *future* effects of discrimination until the victim can be made whole. . . . Front pay is thus a supplement to back pay, not a substitute for it, particularly where as here the front pay is granted to only a limited number of employees.

Id. at 1278-79.

The Tenth Circuit also found that we inadequately considered past discrimination in our distribution of the back pay award. *Id.* at 1279. Essentially, the circuit court held that our focus in distributing back pay was too narrow. For example, we limited the distribution of back pay for discrimination in promotions from the M-40 grade to the M-50 grade to those women already in the M-40 grade. However, this limitation was improper, because absent discrimination, other women would have progressed to the M-40 level.

The Tenth Circuit concluded:

> It is not our province to attempt to devise a remedy at this level. Rather, we remand to allow the district court to resolve these problems. On remand, the court is free to consider any method of determining the appropriate amount of back and front pay to which the class is entitled. Some courts have ordered parties to negotiate a suitable approach to determining back pay. Other courts have expressed a preference for group comparisons. For example, the salary of representative groups of women could be compared with groups of men of similar education and experience or length of service. The differences could be distributed pro rata among the members of the particular groups. By not using the women's current position in the company, the effects of past discrimination may be more fully incorporated into the formula. In principle, the district court's method of calculating the promotions that should have gone to women with those that actually did go to women could again be used. The court, must, however, either attempt to account for the effect of past discrimination on the position of women at the beginning of the relevant period or explain why such consideration is unnecessary.

Id. (citations omitted).

II. *The New Remedy.*

Following the Tenth Circuit's opinion, we directed the parties to attempt to reach an agreement as to the approrpriate [sic] remedy. They were unable to do so, and we ordered them to file briefs addressing (1) the amount

of back pay owed to the class, (2) the proper distribution of back pay to the class, and (3) the front pay owed to the class after reconsideration of the back pay issue.

A. The Amount of Back Pay.

The Tenth Circuit found that our back pay award failed to adequately account for the lingering effects of past discrimination which caused the plaintiff damages during the relevant period. The parties have submitted vastly different proposals as to how we may remedy this failure. The plaintiff proposes that the court

> order defendant to pay to class members a sum equal to the difference between what women were proportionately entitled to receive and the amount they were paid.
>
> * * *
>
> In the salaried grades, in other words, if women comprised 60% of the work force, they should have received 60% of all salaries paid. The back pay fund amount is arrived at by subtracting from this ideal figure the aggregate amount they were actually paid.

We find this approach unacceptable. At issue in this action are a finite number of identifiable decisions by the defendant regarding promotions and downgrades. We should focus these specific decisions and award the plaintiff damages when there is discrimination, rather than simply determining whether woman [sic] received a pro rata portion of all salaries paid.

The defendant proposes that our earlier back pay award sufficiently accounted for the effects of past discrimination and need not be altered. The defendant presents different analysis regarding promotions to section chief, the M-50 grade, and the M-40 grade. As to promotions to section chief, the defendant contends that the court should look separately at employees promoted from the M-50 grade and employees promoted from other grades. It asserts that women received an equitable share of the promotions of non-M-50 employees, and that women were wrongly denied only 0.68 of the section chief promotions that went to M-50 employees. As to promotions to the M-50 grade, the defendant argues that because our prior decision considered as promotions reclassifications and upgrades of employees who were previously downgraded, "the court greatly *enlarged* the backpay from what it would have been if the court had just focused on true vacancies during the liability period." Further, the court's decision not to give the defendant credit for over-promotions of women in 1979 and 1980 enlarged the back pay award. Thus, the defendant contends that the court need not adjust its award of back pay to account for past discrimination in promotions. As to promotions to the M-40 grade, the defendant asserts that the disparity between promotions of men and women before 1975 is statistically insignificant, making revision of the previous back award unnecessary.

Generally, we disagree with the defendant's contention that no revision of our back pay award is warranted in light of the Tenth Circuit's reversal of our earlier order. Further, we are not inclined to adopt a number of the defendant's suggested changes from our earlier orders.

For example, in determining back pay, we will continue to disregard the statistical over-promotions of women which occurred in some years for some grades. Additionally, we still consider as promotions reclassifications and upgrades of persons previously downgraded. Finally, we still believe that the appropriate pool for promotions to each grade consists of those employees in the next lower grade.

Because we find the damages proposals of both parites [sic] to be unacceptable, we must devise our own remedy to alleviate the flaws of our earlier back pay award. As stated above, we must "either attempt to account for the effect of past discrimination on the position of women at the beginning of the relevant period or explain why such consideration is unnecessary." *Pitre*, 843 F.2d at 1279.

Our backpay award will again compare the promotions and downgrades that actually went to women to those that should have gone to women. The difference between the instant remedy and our prior award is the distribution of employees at the beginning of the relevant period.[3] In our earlier award, we began our analysis using the defendant's acutal [sic] work force on December 11, 1974. The instant award begins by developing a hypothetical work force which would have been in place at the end of 1974 if the defendant had not discriminated

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[3] The relevant period runs from December 11, 1974, 180 days before the filing of the plaintiff's Equal Employment Opportunity Commission charge of discrimination, *see* Liability Order at 3, to December 31, 1980, the date of the close of the evidence.

against women in promotions and downgrades between 1965 and 1974. Our calculations regarding this hypothetical work force are included in Table 1.

To devise the hypothetical 1974 work force, we must begin with the 1965 work force and track the promotions and downgrades which would have occurred absent discrimination. Unfortunately, the distribution of employees in 1965 is unknown; thus, it too must be surmised. We took a conglomerate of the 1973 and 1974 work forces to arrive at a hypothetical distribution for 1965. We then analyzed the promotions and downgrades for each grade in each year, and determined (based on the hypothetical percentage of women in the promotion or downgrade pool) the number which would have gone to women absent discrimination. This number is added to the previous year's total of women in the grade, yielding the new total. This new total is divided by the total number of employees in the grade, yielding the new hypothetical percentage of women in the grade.[4]

The actual 1974 work force had fewer employees than the hypothetical 1974 work force which we ascertained in Table 1. To reconcile our hypothetical findings with the actual number of employees, we multiplied the 1974 percentages of women found in Table 1 by the total number of employees in the actual 1974 work force. This yields the number of women that would be employed in each grade in 1974 absent discrimination. These calculations are included in Table 2.

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[4] A more detailed review of the numbers in Table 1 is included in the explanation which precedes the table.

Having determined the hypothetical 1974 work force, we can determine the back pay to which the plaintiff is entitled in much the same manner employed in the damages order and damages judgment. There is, however, one fundamental difference: Previously, we compared the actual promotions and downgrades during the relevant period to those which would have occurred if the defendant had not discriminated after 1974, whereas the instant order compares the actual numbers with those which would have resulted absent discrimination after 1965. In this manner, the instant order compensates the plaintiff for the lingering effect of previous discrimination which was felt by the plaintiff during the relevant period.

Table 3 includes calculations of the positions which women were wrongly denied during the relevant period. For each year, the number of promotions or downgrades of women which would have occurred absent discrimination is netted against the actual number of promotions or downgrades. The difference, if discriminatory, is listed. Table 3 also includes hypothetical work forces for each year in the relevant period; these work forces are determined in the same manner as those in Table 1.[5]

The following is a summary of the damages owed to the plaintiff for statistically excessive downgrades of women during the relevant period. The figures in the *Number of Positions* column are calculated in Table 3 (in that table, they are in the column labelled *Difference (If*

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[5] A more detailed analysis of the numbers in Table 3 is included in the explanation preceding the table.

Discriminatory)). The *Average Monthly Earnings Difference* is the average earnings difference between the women downgraded and the men left in the grade for the period in question. The calculations of these figures are shown and discribed [sic] in Table 4 and its explanation.[6] The *Average Downgrade Length* indicates the average number of months that women were downgraded; Table 5 shows the calculations of these figures. The *Recovery* column indicates the amount to which the plaintiff is entitled. This amount is determined by multiplying the number of positions by the average earnings difference by the average down-grade length.

Grade	Number of Positions	Average Monthly Earnings Difference	Average Down-grade Length (mos.)	Recovery
M-40 to 30	0.80	$ 214	42	$ 7,190
M-30 to 20	2.44	82	25	5,002
M-20 to 10	1.29	134	32	5,532
M-10 to LO	5.85	989	16	36,410
				$54,134

[6] We note that the earnings figures in Table 4 vary from the earnings figures in the damages judgment. In places, the damages judgment does not include the earnings of all appropriate employees in its average earnings calculations. Thus, we chose to recalculate the averages. However, the only evidence of employee earnings before us was provided in an exhibit accompanying the plaintiff's damages memorandum, and the earnings listed in the exhibit were substantially lower (for both men and women) than those listed in the damages judgment. To be consistent, we have used the earnings figures included in the plaintiff's exhibit in all of our calculations regarding back pay.

Thus, the plaintiff is entitled to back pay in the amount of $54,134 for the excessive down-grades.

The amount owed to the plaintiff for wrongfully denied promotions is summarized below. As determined in Table 3, the defendant's discrimination resulted in fewer female promotions to section chief and to grades M-50 and M-30. We analyze each of these employment levels separately. The column entitled *Number of Positions* indicates the number of promotions which women were wrongfully denied in the year in question and in all previous years in the relevant period. These numbers are calculated and explained in Table 6. The *Average Yearly Earnings Difference* column shows the difference in average earnings between men promoted to the level in question and women who remained in the promotion pool. These figures are calculated and further described in Table 7 and its explanation. The *Recovery* column indicates the amount that the plaintiff may recover, which is determined by multiplying the number of positions by the average yearly earnings difference.

Section Chief Promotions

Year	Number of Positions	Average Yearly Earnings Difference	Recovery
1976	0.00	$1,152	$ 0
1977	0.49	1,152	564
1978	1.23	–	0
1979	2.31	2,115	4,886
1980	3.14	3,401	10,679
			$16,129

M-50 Promotions

Year	Number of Positions	Average Yearly Earnings Difference	Recovery
1976	0.98	$2,421	$ 2,373
1977	2.28	1,060	2,417
1978	3.90	1,782	6,950
1979	5.21	3,474	18,100
1980	5.21	4,167	21,710
			$51,550

M-30 Promotions

Year	Number of Positions	Average Yearly Earnings Difference	Recovery
1976	0.17	$1,120	$ 190
1977	0.34	8	3
1978	0.34	431	147
1979	0.34	972	330
1980	0.34	1,678	571
			$ 1,241
		Total	$68,920

Thus, the plaintiff is entitled to $68,920 for back pay for wrongfully denied promotions.

The total back pay owed to the plaintiff for excessive downgrades and wrongfully denied promotions is $123,054. Our damages order awarded the plaintiff

prejudgment interest at the rate established by K.S.A. 16-204, with no annual compounding. As set forth in Table 8, the plaintiff is entitled to $166,308.14 in prejudgment interest on the backpay award. The total amount of back pay and prejudgment interest is therefore $289,362.14. The palintiff [sic] is entitled to post-judgment interest on this amount at the rate provided in K.S.A. 16-204 (post-judgment interest shall be calculated as if this order were dated July 1, 1989).

B. The Amount of Front Pay.

Our earlier award of damages included amounts for front pay, which, as the Tenth Circuit stated, we wrongly used as a substitute for back pay. Nevertheless, the circuit court held that front pay was an appropriate remedy under the facts of this case. *See Pitre*, 843 F.2d at 1276. Having redetermined the back pay to which the plaintiff is entitled, we must reconsider the front pay issue.

"Front pay is intended to compensate victims of discrimination for the continuing *future* effects of discrimination until the victim can be made whole." *Id.* at 1278. In essence, front pay is a substitute for reinstatement. *Bruno v. Western Electric Co.*, 829 F.2d 957, 966 (10th Cir. 1987).

In our damages order, we stated that front pay should be awarded to the plaintiff "until women comprise fifty percent of each M level and the section chief level." Damages Order at 7. The plaintiff contends that front pay should continue until women "are paid aggregate salaries in direct proportion to their representation in the salary grades," and that further discovery is needed as to the front pay issue. The defendant asserts

that the front pay award should cease when women are promoted to fifty percent (50%) of the vacancies for the level in question. However, we remain convinced that front pay should be awarded until women comprise fifty percent (50%) of each M-level and the section chief level.[7] It is true that the defendant will have ceased discriminating once women begin to receive half of the promotions to a given level, but the lingering effects of past discrimination will continue to be felt until women constitute half of the work force for the level.

Since 1980, the defendant's M-level and section chief work force has been greatly reduced, largely because of reorganization following divestiture of the American Telephone and Telegraph Company. Thus, the defendant explains, opportunities to promote women have not been available. Given this, we may choose one of two options: First, we could cease awarding front pay because the defendant's recent actions have been non-discriminatory and because, if possible, the defendant would promote women until they were proportionately represented in the higher employment levels. Alternatively, we could continue to award front pay because even though the defendant would remedy the situation if promotion opportunities were available, women continue to feel the

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[7] We note that since 1985, the defendant has instituted a new employee classification scheme, and that there are no longer M-level or section chief designations. To simplify matters, however, we will continue to refer to M-level employees and section chiefs.

effects of past discrimination. We prefer the second alternative, which places the hardship of the present impossibility of correcting past discrimination on the defendant, the party found to have discriminated, rather than on the plaintiff, the victim of the discrimination.

The front pay to which the plaintiff is entitled is determined in much the same manner as was the back pay award for wrongfully denied promotions. For each year from 1981 to present, the number of positions for which the plaintiff may recover front pay remains constant, and equals the number of positions for which back pay was awarded in 1980. Because no evidence regarding employees' earnings for years after 1980 is before us,[8] we will simply use the earnings differences for 1980, plus an inflation factor of ten percent (10%) per year.[9] Consequently, the front pay to which the plaintiff is entitled for

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[8] As explained in Footnote 6, we choose not to rely on the earnings difference as set forth in the damages judgment. The analysis in the damages judgment does extend through 1984, but it is flawed because (1) not all relevant employee's earnings are used in the calculations, and (2) no calculations were made as to the earnings difference between men promoted to section chief and women remaining in the M-50 grade.

[9] Although we have labelled the ten percent (10%) increase an "inflation factor," the increase is not intended to reflect inflation as it is ordinarily understood. Rather, it reflects the fact that for each grade at issue, the earnings difference between men and women increased during the relevant period (usually the rise was rather steady, and usually it was at a rate significantly greater than ten percent (10%)). We assume that this trend continued through the 1980's, but that the yearly increases in the earnings difference slowed because of the defendant's heightened awareness of the need to treat women fairly.

Additionally, we note that the figures on earnings differences included in the damages judgment, which run through

each year after 1980 is equal to the back pay due the plaintiff for 1980, plus ten percent (10%) per year. The yearly front pay recoveries are set forth below:

1981	$ 36,256
1982	39,882
1983	43,870
1984	48,257
1985	53,082
1986	58,391
1987	64,230
1988	70,653
1989 (6 mos.)	38,859
Total	$453,480

Thus, the plaintiff may recover a total of $453,480 in front pay. Under our damages order, the plaintiff is entitled to prejudgment interest on the front pay award at the state statutory rate. This prejudgment interest, calculated in Table 9, totals $197,668.93. Consequently, the plaintiff is entitled to a total of $651,148.93 for front pay and prejudgment interest on the front pay. The plaintiff may recover post-judgment interest on this amount at the rate set forth in K.S.A. 16-204 (as with back pay, post-judgment interest on front pay shall be calculated as if this order were dated July 1, 1989). Accordingly, the total amount of front pay, back pay, and prejudgment interest is $940,511.07.

1984, support our assumption that the earnings difference between men and women continued to rise.

C. The Distribution of the Award.

The Tenth Circuit also found that we "insufficiently considered the effects of past discrimination in determining how to distribute the amount of back pay." *Pitre*, 843 F.2d at 1278. Our earlier award limited the distribution of back pay to women in the promotion or downgrade pool for the position in question. For example, women in the M-40 grade were the only class members to recover for denial of promotions to the M-50 grade. However, as explained by the circuit court, "but for the discrimination, other women would have progressed to the M-40 level. . . . By not using the women's current position in the company, the effects of past discrimination may be more fully incorporated into the formula." *Id.*

The Tenth Circuit indicated that we should consider the plaintiff's proposal regarding distribution:

> [T]he district court might well consider the plaintiff class' expressed desire as to how the award should be distributed among the class members. In Title VII suits, the class victims are often in the best position to evaluate the actual damage caused to particular individuals by discrimination in employment practices. We stress, however, that the ultimate fashioning of relief is left to the district court's good judgment. . . .

Id. at 1279-80 (citation omitted). The plaintiff proposes that the award be distributed based on seniority:

> The damages suffered by the class at both the salaried and supervisory levels should be lumped together and distributed pro rata according to length of seniority. Plaintiff proposes to reward those class members who

> assisted in presenting the case with a bonus [extending their length of service by 25% for purposes of determining the distribution of the award].
>
> Exactitude and absolute fairness are beyond reach, as most courts and the Tenth Circuit have noted. But substantial fairness can be achieved by lumping together both the salaried and section chief back pay funds and paying each class member a proportional share of the damages, based upon length of seniority. It is at least arguable, and not patently unreasonable, to conclude that the longer a woman remained employed at Western Electric, the more quantitative discrimination she suffered.

We find the plaintiff's suggestion to be reasonable. The court, relying on Appendix L to the plaintiff's damages memorandum, has prepared Table 10, which indicates each class member's length of service and recovery in connection with the back pay award.

Moreover, although the circuit court's opinion did not address the issue, we agree with the plaintiff that front pay should likewise be distributed proportionately. However, the plaintiff appears to suggest that the front pay award should be divided among all class members, no matter their employment status. We disagree. Front pay is awarded in lieu of promoting victims of discrimination. It reasonably follows that anyone who leaves employment with the defendant is no longer entitled to front pay. We have no evidence before us indicating which class members have been terminated since the close of the relevant period, and thus we cannot set forth the distribution of front pay. The plaintiff is directed to

prepare and circulate to the defendant for approval a journal entry regarding front pay conforming to the following standards: Front pay is to be distributed proportionately based on the class members' length of service as set forth in Table 10. Each yearly front pay total plus the interest accrued on such total, as set forth in Table 11, shall be divided among only those class members who remained employed by the defendant at the close of the year in question. In other words, if J. Alonzo was terminated in 1984, she could share in the front pay awards for 1981, 1982, and 1983, but not in the awards for subsequent years. Her portion of the 1981 award, for example, would depend on her length of service as compared to the total length of service of all of the class members entitled to share in the 1981 award.

Finally, the plaintiff urges the court to expand the injunctive relief previously granted to provide for monitoring and reporting. We decline to do so; no change is made from the injunctive relief provided in the original damages order. We additionally note that the plaintiff is entitled to reasonable attorney's fees incurred since July 1, 1985. However, we have no evidence before us regarding attorney's fees, and we therefore make no determination on fees at this date. We urge the parties to negotiate and resolve this matter on their own if at all possible.

IT IS THEREFORE ORDERED that the plaintiff is entitled to recover from the defendant back pay plus prejudgment interest in the amount of $289,362.14. This sum shall be distributed to the class in accordance with the instant order (see Table 10). Post-judgment interest on

the back pay award shall be determined at the rate provided by K.S.A. 16-204, and shall be calculated as if this order were dated July 1, 1989.

IT IS FURTHER ORDERED that the plaintiff is entitled to recover from the defendant front pay plus interest in the amount of $651,148.93. The plaintiff shall prepare and present to the court an approved journal entry regarding distribution of this sum, in accordance with the directives of the instant order (see page 976 and Table 11). Post-judgment interest on the front pay award shall be calculated at the rate set forth in K.S.A. 16-204, and shall be computed as if this order were dated July 1, 1989.

APPENDIX

Summary of Tables

Table 1: Tracking of the Hypothetical Work Force, 1965-1974

Table 2: Hypothetical 1974 Work Force

Table 3: Promotion and Downgrade Analysis, 1974-1980

Table 4: Average Monthly Earnings Difference – Downgrades

Table 5: Average Length of Female Downgrades

Table 6: Cumulative Effects of Discriminatory Promotion

Table 7: Average yearly Earnings Difference – Promotions

Table 8: Prejudgment Interest on the Back Pay Award

Table 9: Prejudgment Interest on the Front Pay Award

Table 10: Distribution of the Back Pay Award Among Class Members

Table 11: Yearly Front Pay Awards, Including Interest, To Divide Among the Class

Explanation of Table 1

Table 1 is a hypothetical tracking of the distribution of the defendant's work force assuming that there was no discrimination after 1965. The purpose of the table is to determine the 1974 percentage of females at various employment levels which would have resulted from non-discriminatory conduct. The table is based on the actual number of promotions and downgrades which occurred from 1966 to 1974. However, the table's numbers are entirely hypothetical because no data regarding the number of persons in each grade in 1965 is available, and because the defendant engaged in discrimination after 1965. A brief explanation of each column follows.

Year, grade: This column includes each employment grade for the years 1966 to 1974.

Prior total: This column indicates the total number of employees in the grade in the previous year. No actual totals are available. For 1966, the prior totals are the averages of the 1973 and 1974 totals. Subsequent year's totals are based on these averages and the promotions and downgrades between 1965 and the year in question. As to M-10s, the court has assumed that the total for each year from 1966 to 1974 is 34.

Additions: This column shows the number of persons added to the grade during the year in question. Additions

result from promotions of persons in the next lower grade, and from downgrades of persons in the next higher grade.

Subtractions: This column indicates the number of persons that left the grade during the year in question. Persons leave the grade, or are subtracted, because they are promoted or downgraded.

New total: This column indicates the total number of employees in the grade for the year in question. The *prior total* plus *additions* minus *subtractions* equals the *new total*.

Prior female total: This column indicates the number of women in the grade in the previous year. The 1966 totals are based on the averages of the 1973 and 1974 totals.

Expected female additions: This column shows the number of women which would have been added to the grade if the defendant did not discriminate in its promotions and downgrades. In the case of promotions, the numbers are arrived at by multiplying the *additions* to the grade in question by the previous year's *percentage of females* in the next lower grade. (The female percentages for 1965, which are not listed, may be calculated by dividing the 1966 *prior female total* by the 1966 *prior total*.) In the case of downgrades, which for purposes of Table 1 occurred only in 1974, the numbers are arrived at by multiplying the *additions* to the grade by the previous year's *percentage of females* in the next higher grade. As to M-10's, the court has assumed that fifty percent (50%) of the additions are women.

Expected female subtractions: This column shows the number of women which would have left the grade if the defendant did not discriminate. For both promotions and downgrades, the numbers are arrived at by multiplying the *subtractions* to the grade in question by the previos [sic] year's *percentage of females* in the same grade.

New female total: This column indicates the number of women in the grade for the year in question. The *prior female total* plus the *expected female additions* minus the *expected female subtractions* equals the *new female total.*

Percentage of females: This column indicates the percentage of females which would be in the grade at the end of the year in question if the defendant had not discriminated. The numbers are determined by dividing the *new female total* by the *new total.*

Table 1: The Hypothetical Workforces, 1965–1974

year, grade	prior total	additions	subtractions	new total	prior female total	expected female additions	expected female subtractions	new female total	percentage of females
1966									
sc	41	3	0	44	2	0.21	0.00	2.21	5
m50	29	6	3	32	2	2.88	0.21	4.67	15
m40	25	4	6	23	12	3.08	2.88	12.20	53
m30	22	2	4	20	17	1.16	3.08	15.08	75
m20	12	5	2	15	7	4.25	1.16	10.09	67
m10	34	5	5	34	29	2.50	4.25	27.25	80
1967									
sc	44	2	0	46	2.21	0.30	0.00	2.51	5
m50	32	3	2	33	4.67	1.59	0.30	5.96	18
m40	23	5	3	25	12.20	3.75	1.59	14.36	57
m30	20	8	5	23	15.08	5.36	3.75	16.69	73
m20	15	9	8	16	10.09	7.20	5.36	11.93	75
m10	34	9	9	34	27.25	4.50	7.20	24.55	72
1968									
sc	46	5	0	51	2.51	0.90	0.00	8.41	7
m50	33	11	5	39	5.96	6.27	0.90	11.33	29
m40	25	8	11	22	14.36	5.84	6.27	13.93	63
m30	28	6	8	21	16.69	4.50	5.84	15.35	73
m20	16	6	6	16	11.93	4.32	4.50	11.75	73
m10	34	6	6	34	24.55	3.00	4.32	23.23	68
1969									
sc	51	1	0	52	3.41	0.29	0.00	3.70	7
m50	39	5	1	43	11.33	3.15	0.29	14.19	33
m40	22	4	5	21	13.93	2.92	3.15	13.70	65
m30	21	2	4	19	15.35	1.46	2.92	13.89	73
m20	16	5	2	19	11.75	3.40	1.46	13.69	72
m10	34	5	5	34	23.23	2.50	3.40	22.33	66
1970									
sc	52	6	0	58	3.70	1.98	0.00	5.68	10
m50	43	11	6	48	14.19	7.15	1.98	19.36	40
m40	21	10	11	20	13.70	7.30	7.15	13.85	69
m30	19	11	10	20	13.89	7.92	7.30	14.51	73
m20	19	6	11	14	13.69	3.96	7.92	9.73	70
m10	34	6	6	34	22.33	3.00	3.96	21.37	63
1971									
sc	58	6	0	64	5.68	2.40	0.00	8.08	13
m50	48	10	6	52	19.36	6.90	2.40	23.86	46
m40	20	1	10	11	13.85	0.73	6.90	7.68	70
m30	20	1	1	20	14.51	0.70	0.73	14.48	72
m20	14	10	1	23	9.73	6.30	0.70	15.33	67
m10	34	10	10	34	21.37	5.00	6.30	20.07	59
1972									
sc	64	1	0	65	8.08	0.46	0.00	8.54	13
m50	52	1	1	52	23.86	0.70	0.46	24.10	46
m40	11	3	1	13	7.68	2.16	0.70	9.14	70
m30	20	4	3	21	14.48	2.68	2.16	15.00	71
m20	23	6	4	25	15.33	3.54	2.68	16.19	65
m10	34	6	6	34	20.07	3.00	3.54	19.53	57
1973									
sc	65	5	0	70	8.54	2.30	0.00	10.84	15
m50	52	0	5	47	24.10	0.00	2.30	21.80	46
m40	13	4	0	17	9.14	2.84	0.00	11.98	70
m30	21	8	4	25	15.00	5.20	2.84	17.36	69
m20	25	11	8	28	16.19	6.27	5.20	17.26	62
m10	34	11	11	34	19.53	5.50	6.27	18.76	55
1974 promotions									
sc	70	1	0	71	10.84	0.46	0.00	11.30	16
m50	47	2	1	48	21.80	1.40	0.46	22.74	47
m40	17	5	2	20	11.98	3.45	1.40	14.03	70
m30	25	4	5	24	17.36	2.48	3.45	16.39	68
m20	28	3	4	27	17.26	1.65	2.48	16.43	61
m10	34	3	3	34	18.76	1.50	1.65	18.61	55

year, grade 1974	prior total	additions	subtractions	new total	prior female total	expected female additions	expected female subtractions	new female total	percentage of females
downgrades									
sc	71	0	0	71	11.30	0.00	0.00	11.30	16
m50	48	0	0	48	22.74	0.00	0.00	22.74	47
m40	20	0	1	19	14.03	0.00	0.70	13.33	70
m30	24	1	2	23	16.39	0.70	1.36	15.73	68
m20	27	2	3	26	16.43	1.36	1.83	15.96	61
m10	34	3	5	32	18.61	1.83	2.75	17.69	55

Table 2: The Hypothetical 1974 Work Force

To determine how females would be distributed in the 1974 work force had there been no discrimination since 1965, the court multiplied the hypothetical percentage of females in each grade, as determined in Table 1, by the actual total number of workers in the grade in 1974.

Grade	Percent Female	Total in Grade	Total Females
Section Chief	16%	41	6.56
M–50	47%	26	12.22
M–40	70%	28	19.60
M–30	68%	23	15.64
M–20	61%	13	7.93
M–10	55%	19	10.45

Explanation of Table 3

Table 3 compares the actual promotions and downgrades of women during the relevant period (1974 to 1980) to those which would have occurred had the defendant not discriminated since 1965. For each year, the table includes (1) promotion and/or downgrade analysis and (2) a hypothetical work force assuming no discrimination since 1965.

The columns included in the promotion and downgrade analysis are as follows:

Grade: This column includes each employment grade.

Total promotions [downgrades): This column indicates the total number of employees promoted to or downgraded from the grade in question.

Hypothetical female %: This column shows the percentage of women which would be in the promotion pool or the downgrade pool if the defendant had not discriminated since 1965. The promotion pool consists of the employees in the next lower grade in the previous year. For example, the promotion pool for section chief promotions in 1978 consists of employees in the M–50 grade in 1977. To determine the percentage of women in the pool (the hypothetical female %) look to the 1977 hypothetical work force's percentage of females for grade M–50. The downgrade pool consists of the employees in the same grade in the previous year. For example, the downgrade pool for section chief demotions in 1975 consists of employees in the section chief grade in 1974. To determine the percentage of women in the pool (the hypothetical female %), look to the 1974 hypothetical work force's percentage of females for section chief.

Expected female promotions (downgrades): This column indicates the number of women which would have been promoted or downgraded had there been no discrimination after 1965. The numbers are derived by multiplying the total promotions (downgrades) by the hypothetical female %.

Actual female promotions (downgrades): This column shows the actual number of women that the defendant promoted or downgraded during the year.

Difference (if discriminatory): This column shows the number of women denied placement in the grade because of the defendant's discrimination. In the case of promotions, the expected female promotions minus the actual female promotions yields the number of women wrongly denied promotion into the grade. Only positive numbers, indicating under-promotion of women, are listed. In the case of downgrades, the actual female downgrades minus the expected female downgrades equals the number of women wrongly demoted from the grade. Only positive numbers, indicating excessive downgrading of women, are listed.

Table 3 also includes a hypothetical work force for each year during the relevant period. The hypothetical work force indicates the distribution of the defendant's employees which would have resulted if the defendant had not engaged in discriminatory conduct after 1965. Basically, this part of Table 3 is an extension of Table 1, and an explanation of

each column is included in the Explanation of Table 1. Columns two through five (prior total, additions, subtractions, and new total) track the actual promotions and downgrades of the people employed in grades M–10 through section chief on December 11, 1975; the numbers in these columns are not hypothetical. The last five columns (prior female total, expected female additions, expected female subtractns, new female total, and percentage of females) indicate the hypothetical distribution of women in the grades, based on the actual totals of employees in the grades, which would have occurred absent discrimination following 1965.

Table 3: Promotion and Downgrade Analysis, 1974–1980

1975 Downgrade Analysis

grade	total downgrades	hypothetical female %	expected female downgrades	actual female downgrades	difference (if discriminatory)
sc	0	16	0.00	0	
m50	6	47	2.82	1	
m40	6	70	4.20	5	0.80
m30	10	68	6.80	8	1.20
m20	11	61	6.71	8	1.29
m10	13	55	7.15	13	5.85

1975 Hypothetical Work Force

grade	prior total	additions	subtractions	new total	prior female total	expected female additions	expected female subtractions	new female total	percentage of females
sc	41	0	0	41	6.56	0.00	0.00	6.56	16
m50	26	0	6	20	12.22	0.00	2.82	9.40	47
m40	28	6	6	28	19.60	2.82	4.20	18.22	65
m30	23	6	10	19	15.64	4.20	6.80	13.04	69
m20	13	10	11	12	7.93	6.80	6.71	8.02	67
m10	19	11	13	17	10.45	6.71	7.15	10.01	59

1976 Downgrade Analysis

grade	total downgrades	hypothetical female %	expected female downgrades	actual female downgrades	difference (if discriminatory)
sc	0	16	0.00	0	
m50	0	47	0.00	0	
m40	0	65	0.00	0	
m30	4	69	2.76	4	1.24
m20	0	67	0.00	0	
m10	0	59	0.00	0	

1976 Hypothetical Work Force (considering downgrades only)

grade	prior total	additions	subtractions	new total	prior female total	expected female additions	expected female subtractions	new female total	percentage of females
sc	41	0	0	41	6.56	0.00	0.00	6.56	16
m50	20	0	0	20	9.40	0.00	0.00	9.40	47
m40	28	0	0	28	18.22	0.00	0.00	18.22	65
m30	19	0	4	15	13.04	0.00	2.76	10.28	69
m20	12	4	0	16	8.02	2.76	0.00	10.78	67
m10	17	0	0	17	10.01	0.00	0.00	10.01	59

1976 Promotion Analysis

grade	total promotions	hypothetical f% promo pool	expected female promotions	actual female promotions	difference (if discriminatory)
sc	0	47	0.00	0	
m50	3	65	1.95	0	1.95
m40	0	69	0.00	0	
m30	2	67	1.34	1	.034
m20	0	59	0.00	0	
m10	0	——	0.00	0	

1976 Hypothetical Work Force (considering downgrades and promotions)

grade	prior total	additions	subtractions	new total	prior female total	expected female additions	expected female subtractions	new female total	percentage of females
sc	41	0	0	41	6.56	0.00	0.00	6.56	16
m50	20	3	0	23	9.40	1.95	0.00	11.35	49
m40	28	0	3	25	18.22	0.00	1.95	16.27	65
m30	15	2	0	17	10.28	1.34	0.00	11.62	68
m20	16	0	2	14	10.78	0.00	1.34	9.44	67
m10	17	0	0	17	10.01	0.00	0.00	10.01	59

1977 Promotion Analysis

grade	total promotions	hypothetical f% promo pool	expected female promotions	actual female promotions	difference (if discriminatory)
sc	2	49	0.98	0	0.98
m50	1	65	0.65	0	0.65
m40	0	68	0.00	0	
m30	1	67	0.67	1	
m20	3	59	1.77	3	
m10	0	—	0.00	0	

1977 Hyopthetical Work Force

grade	prior total	additions	subtractions	new total	prior female total	expected female additions	expected female subtractions	new female total	percentage of females
sc	41	2	0	43	6.56	0.98	0.00	7.54	18
m50	23	1	2	22	11.35	0.65	0.98	11.02	50
m40	25	0	1	24	16.27	0.00	0.65	15.62	65
m30	17	1	0	18	11.62	0.67	0.00	12.29	68
m20	14	3	1	16	9.44	1.77	0.67	10.54	66
m10	17	0	3	14	10.01	0.00	1.77	8.24	59

1978 Promotion Analysis

grade	total promotions	hypothetical f% promo pool	expected female promotions	actual female promotions	difference (if discriminatory)
sc	5	50	2.50d	2	0.50
m50	4	65	2.60	0	2.60
m40	1	68	0.68	1	
m30	3	66	1.98	3	
m20	6	59	3.54	5	
m10	0	—	0.00	0	

1978 Hypothetical Work Force

grade	prior total	additions	subtractions	new total	prior female total	expected female additions	expected female subtractions	new female total	percentage of females
sc	43	5	0	48	7.54	2.50	0.00	10.04	21
m50	22	4	5	21	11.02	2.60	2.50	11.12	53
m40	24	1	4	21	15.62	0.68	2.60	13.70	65
m30	18	3	1	20	12.29	1.98	0.68	13.59	68
m20	16	6	3	19	10.54	3.54	1.98	12.10	64
m10	14	0	6	8	8.24	0.00	3.54	4.70	59

1979 Promotion Analysis

grade	total promotions	hypothetical f% promo pool	expected female promotions	actual female promotions	difference (if discriminatory)
sc	5	53	2.65	1	1.65
m50	3	65	1.95	2	
m40	4	68	2.72	4	
m30	10	64	6.40	7	
m20	9	59	5.31	6	
m10	0	—	0.00	0	

1979 Hypothetical Work Force

grade	prior total	additions	subtractions	new total	prior female total	expected female additions	expected female subtractions	new female total	percentage of females
sc	48	5	0	53	10.04	2.65	0.00	12.69	24
m50	21	3	5	19	11.12	1.95	2.65	10.42	55
m40	21	4	3	22	13.70	2.72	1.95	14.47	66
m30	20	10	4	26	13.59	6.40	2.72	17.27	66
m20	19	9	10	18	12.10	5.31	6.40	11.01	61
m10	8	0	9	0	4.70	0.00	5.31	0.00	—

1980 Promotion Analysis

grade	total promotions	hypothetical 1% promo pool	expected female promotions	actual female promotions	difference (if discriminatory)
sc	0	55	0.00	0	
m50	1	66	0.66	1	
m40	2	66	1.32	2	
m30	3	61	1.83	2	
m20	4	—	0.00	4	
m10	0	—	0.00	0	

Explanation of Table 4

Table 4 shows the average monthly earnings difference between women who were demoted from a grade and men who remained in the grade. We focus on the years 1976, 1977, and 1978 because they are the downgraded years for most women.

If a woman was downgraded for only part of a year, her salary is not considered in our determination of the average monthly salary. For example, J.H. Deutman is not included in the *M–40 to M–30* portion of this table, because she was not at the M–30 grade for the entire year of 1975 or 1976. We note that this does not mean that we do not consider J.H. Deutman's downgrade in our back pay award. Rather, we simply do not use her salary figures in determining the average monthly pay of women downgraded from M–40 to M–30. For women who were laid off from the M–10 grade, the court has used an average monthly salary of $600. This reflects the facts that the laid-off women were entitled to unemployment compensation and were able-bodied persons capable of work, but were not likely to easily obtain jobs at their former salary.

To determine the average monthly pay of men who remained in the grade, we used the 1976 to 1978 salaries of men who were in the grade throughout the relevant period (December 11, 1974 to December 31, 1980). No men remained in the M–10 grade throughout the relevant period. However, D.M. Gate was in the M–10 grade until 1979, and we have used his salary for the years 1976 to 1978 to determine the average monthly salary of men who remained in the grade.

Table 4: Average Monthly Earnings Difference—Downgrades

Women Downgraded From M–40 to M–30	1976	1977	1978	Total
M.B. Brown	12,774	13,860		26,634
J.G. Fanning	12,570	13,656	14,676	40,902
D.H. Johnson	12,774	13,860	14,480	41,114
E.E.Volner	12,774	13,860	14,880	41,514
				150,165

150,164 ÷ 11 (total years downgraded ÷ 12 months in year) = 1,138 (average monthly salary)

Men Remaining in M–40	1976	1977	1978	Total
G.R. Cole	14,244	15,702	16,902	46,866
R.E. Hale	14,352	15,648	16,884	46,884
D.J. Hicks	15,300	16,878	18,084	50,262
M.L. Read	14,568	16,086	17,692	48,346
J.E. Reeder	15,000	16,498	17,772	49,270
R.E. Wegley	15,444	16,902	18,135	50,481
				292,109

292,109 ÷ 18 (total years in grade) ÷ 12 (months in year) = 1,352 (average monthly salary)

DIFFERENCE: 1,352 – 1,138 = 214

Women Downgraded From M-30 to M-20	1976	1977	1978	Total
L.M. Campbell		12,420		12,420
J.H. Deutman		12,730		12,730
C.L. Grosdidier	11,640	12,624	13,560	37,824
C.A. Martin	11,640			11,640
R.S. Stroth		12,672	13,608	26,280
D.H. Swope	11,640	12,624		24,264
D.M. Thorington		12,672	13,608	26,280
A.H. Wynne	11,664	12,648		24,312
				175,750

175,750 ÷ 14 (total years in grade ÷ 12 (months in year) = 1,046 (average monthly salary)

Men Remaining in M-30	1976	1977	1978	Total
R.W. Kelly	12,318	13,516	14,760	40,594
				40,594

40,594 ÷ 3 (total years in grade) ÷ 12 (months in year) = 1,128 (average monthly salary)

DIFFERENCE: 1,128 – 1,046 = 82

Women Downgraded From M-20 to M-10	1976	1977	1978	Total
K.C. Bowdish	10,476	11,292		21,768
S.T. Brannon	10,476			10,476
D.S. DeGraeves	10.035	9,881	10,720	30,636
E.D. Finnell	10,513			10,513
P.D. Jones	10.476	11,292	12,060	33,828
W.G. Wilhoite	10,056	11,337		21,393
				128,614

128,614 ÷ 12 (total years in grade) ÷ 12 (months in year) = 893 (average monthly salary)

Men Remaining in M-20	1976	1977	1978	Total
R.J. Fortune	11,054	12,312	13,606	36,972
				36,972

36,972 ÷ 3 (total years in grade) ÷ 12 (months in year) = 1,027 (average monthly salary)

DIFFERENCE: 1,027 – 893 = 134

Women Laid Off From M-10
600 = average monthly salary

Men Remaining in M-10	1976	1977	1978	Total
D.M. Gates	10,824	11,930	12,856	35,610
				35,610

35,610 ÷ 3 (total years in grade) ÷ 12 (months in grade) = 989 (average monthly salary)

DIFFERENCE: 989 – 600 = 389

Table 5: Average Length of Female Downgrades

M-40 to M-30	Number of Months
M.B. Brown	38
J.H. Deutman	8
J.G. Fanning	46
D.H. Johnson	54
E.E. Volner	66
	212

Average = 42

M-30 to M-20	
L.M. Campbell	30
J.H. Deutman	26
C.L. Grosdidier	42
C.A. Martin	22
J.D. Rainwater	12
K.K. Shepherd	12
R.S. Stroh	35

M–30 to M–20	Number of Months	
D.B. Swope	34	
D.M. Thorington	39	
B.H. Wienke	8	
C.W. Williams	8	
A:H. Wynne	35	
	303	Average = 25
M–20 to M–10		
K.C. Bowdish	35	
S.T. Brannon	26	
D.S. DeGraeves	43	
E.D. Finnell	33	
P.D. Jones	46	
J.B. Schooler	8	
K.K. Shepherd	30	
W.G. Wilhoite	34	
	255	Average = 32
M–10 to laid off		
D.A. Belk	66	
B.A. Bradley	66	
D.H. Brannon	12	
A.M. Calvin	17	
P.A. Chase	69	
K.J. Cook	60	
B.L. Draskovic	60	
A.P. Gomez	70	
M.W. McCracken	10	
I.G. Mendez	26	
D.M. Pitts	71	
P.T. Pitts	69	
M.K. Tomlin	72	
	668	Average = 51

Although the average length of the layoffs is 51 months, the court will not use this figure in its damages determination. It is unduly large because it includes the layoff periods of numerous women who were never rehired. We will instead use in our calculations a layoff figure of 16 months, the average length of the layoffs of the women who were recalled (D.H. Brannon, A.M. Calvin, M.W. McCracken, and I.G. Mendez).

Table 6: Cumulative Effects of Discriminatory Promotions

To determine the cumulative effects of discriminatory promotions, the court begins by looking to Table 3 to determine the number of promotions wrongfully denied to women in each year for each grade (Promotions Denied). Promotions do not all occur on January 1; rather they are scattered throughout the year. To reflect this fact, we assume that all promotions occur in the middle of the year, and thus, for the year in question the plaintiff may recover for only one-half of the number of Promotions Denied. This number is found in the Yearly Positions Compensated column. Additonally, because a promoted employee enjoys a greater salary in the promotion year and in all subsequent years, our award compensates the plaintiff for the year of the wrongfully denied promotion and for subsequent years in the relevant period. For example, the cumulative number of positions for which the plaintiff should receive compensation for the defendant's failure to promote women to grade M–50 in the year 1978 includes the total of the Promotions Denied in 1976 and 1977, plus the 1978 Yearly Positions Compensated. This aggregate number is found in the column labelled Cumulative Positions Compensated.

Year, Grade	Promotions Denied	Yearly Positions Compensated	Cumulative Positions Compensated
1976			
M-50	1.95	0.98	0.98
M-30	0.34	0.17	0.17
1977			
Section Chief	0.98	0.49	0.49
M-50	0.65	0.33	2.28
M-30			0.34
1978			
Section Chief	0.50	0.25	1.23
M-50	2.60	1.30	3.90
M-30			0.34
1979			
Section Chief	1.65	0.83	2.31
M-50			5.21
M-30			0.34
1980			
Section Chief			3.14
M-50			5.21
M-30			0.34

Explanation of Table 7

Table 7 shows the average yearly earnings difference between men who were promoted to a higher grade and women who remained in a lower grade. The calculations for each particular grade are made only for those years in which women were wrongfully denied promotions (see Tables 3 and 6). If a man was promoted for only part of a year, his salary for that partial year is not considered in our determination of the average yearly earnings for promoted men. Nonetheless, we still consider his promotion in our determination of promotions wrongfully denied and our back pay award.

Generally, persons recently promoted receive a lower salary than persons who have been in a position for a longer period of time. For 1976 and 1977, the years immediately following the downgrade period, there are no numbers available for recently promoted persons (because nobody was promoted during the downgrade period). Thus, the court has in places used the 1978 numbers for 1977, and the 1977 numbers for 1976 (an asterisk marks these substitutions).

Table 7: Average Yearly Earnings Difference—Promotions

Men Promoted to Section Chief	1976	1977	1978	1979	1980
E.R. Cronin	—	—	18,200	21,707	25,133
O. Fowler	—	—	18,200	21,807	25,078
R.J. Hinkle	—	—	19,617	21,612	27,133
J.K. Morrison	—	—	—	23,733	26,783
C.B. Martin	—	—	—	22,379	25,133
R.D. Edwards	—	—	—	21,031	26,467
A.P. Ramirez	—	—	—	—	22,450
J.R. Staley	—	—	—	—	25,033
S.E. Endecott	—	—	—	—	23,300
Average	18,672*	18,672*	18,672	22,045	25,168
Women M-50's Not Promoted	**1976**	**1977**	**1978**	**1979**	**1980**
J.D. Pitre	—	17,520	19,208	19,930	21,385
S.P. Rogers	—	—	—	—	21,958
L.G. Stanley	—	—	—	—	21,958
Average	17,520*	17,520	19,208	19,930	21,767
Difference	1,152	1,152	—	2,115	3,401
Men Promoted to M-50	**1976**	**1977**	**1978**	**1979**	**1980**
S.E. Endecott	—	16,944	18,300	—	—
J.E. Jones	—	—	—	21,790	23,698

Men Promoted to M–50	1976	1977	1978	1979	1980
C.J. Leon	—	—	—	21,676	23,905
J.E. Russell	—	—	—	—	21,958
R.C. Updike	—	—	19,752	21,508	—
D.A. Burnett	—	16,276	18,036	20,046	21,958
J.R. Staley	—	16,944	18,900	—	—
Average	16,721*	16,721	18,747	21,255	22,880

Women M–40's Not Promoted	1976	1977	1978	1979	1980
L.G. Stanley	14,244	15,492	16,632	—	—
M.B. Brown	—	—	—	16,318	18,422
J.G. Fanning	—	—	—	—	17,074
B.E. Hartsell	13,056	14,304	15,444	16,914	18,830
J.V. Hotchkiss	13,036	14,304	15,444	16,914	18,526
I.G. Hueston	15,384	16,892	18,396	—	—
D.H. Johnson	—	—	—	—	17,834
B.C. Miller	14,375	15,784	17,136	18,616	21,048
M.V. Miller	14,028	15,404	16,800	18,530	—
G.W. Moore	14,628	16,142	17,746	19,394	21,224
S.P. Rogers	15,651	16,966	18,120	—	—
S.R. Reed	—	—	—	—	17,009
C.S. Smerchek	—	—	—	—	18,448
Average	14,300	15,661	16,965	17,781	18,713
Difference	2,421	1,060	1,782	3,474	4,167

Men Promoted to M–30	1976	1977	1978	1979	1980
J.D. Milburn	—	—	—	—	16,572
S.D. Kreighbaum	—	12,488	13,770	15,133	16,572
R.W. Mead	—	—	—	—	16,142
Average	12,488*	12,488	13,770	15,133	16,429

Women M–20's Not Promoted	1976	1977	1978	1979	1980
J.H. Deutman	—	12,730	—	—	—
S.T. Brannon	—	—	13,584	14,796	—
L.M. Campbell	—	12,420	—	—	—
C.L. Grosdidier	11,640	12,624	13,560	—	—
C.A. Martin	11,640	—	—	—	—
R.S. Stroth	—	12,672	13,608	—	—
D.B. Swope	11,640	12,624	—	—	—
D.M. Thorington	—	12,672	13,608	—	—
A.H. Wynne	11,664	12,648	—	—	—
D.S. DeGraeves	—	—	—	13,804	15,130
E.D. Finnell	—	—	12,828	14,034	15,334
D.S. Hodge	10,931	12,250	13,576	15,132	13,832
P.D. Jones	—	—	—	—	15,538
D.S. Pittman	10,692	11,676	12,612	13,819	—
P.H. Gulley	—	—	—	13,380	15,054
M.W. McCracken	—	—	—	—	13,617
Average	11,368	12,480	13,339	14,161	14,751
Difference	1,120	8	431	972	1,678

Table 8: Prejudgment Interest on the Back Pay Award

Table 8 shows the prejudgment interest on the back pay award. The interest on the back pay earned in each year during the relevant period is set forth separately. The table reflects the fact that the applicable Kansas statutory rate for post-judgment interest varied throughout the years. *See* K.S.A. 16–204. Likewise, the prejudgment interest rate must vary.

We have not previously allotted the total back pay for excessive downgrades ($54,134) between the years 1975 and 1976. The only excessive downgrades in 1976 were 1.24

downgrades from M–30 to M–20. Given the average monthly earnings difference of $82 (see Table 4) and the 25 month average length of downgrades (see Table 5), the plaintiff is entitled to $2,050 for downgrades in 1976. Thus, the plaintiff is entitled to $52,084 for downgrades in 1975.

1975 Back Pay: $52,084	Rate	Years	Interest
July 1975 to June 1980	0.08	5	20,833.60
July 1980 to June 1982	0.12	2	12,500.16
July 1982 to June 1986	0.15	4	31,250.40
July 1986 to June 1987	0.105	1	5,468.82
July 1987 to June 1988	0.095	1	4,947.98
July 1988 to June 1989	0.10	1	5,208.40
			80,209.36

1976 Back Pay: $4,613	Rate	Years	Interest
July 1976 to June 1980	0.08	4	1,476.16
July 1980 to June 1982	0.12	2	1,107.12
July 1982 to June 1986	0.15	4	2,767.80
July 1986 to June 1987	0.105	1	484.37
July 1987 to June 1988	0.095	1	438.24
July 1988 to June 1989	0.10	1	461.30
			6,734.99

1977 Back Pay: $2,984	Rate	Years	Interest
July 1977 to June 1980	0.08	3	716.00
July 1980 to June 1982	0.12	2	716.16
July 1982 to June 1986	0.15	4	1,790.40
July 1986 to June 1987	0.105	1	313.32
July 1987 to June 1988	0.095	1	283.48
July 1988 to June 1989	0.10	1	298.40
			4,117.76

1978 Back Pay: $7,097	Rate	Years	Interest
July 1978 to June 1980	0.08	2	1,135.52
July 1980 to June 1982	0.12	2	1,703.28
July 1982 to June 1986	0.15	4	4,258.20
July 1986 to June 1987	0.105	1	745.19
July 1987 to June 1988	0.095	1	674.22
July 1988 to June 1989	0.10	1	709.70
			9,226.11

1979 Back Pay: $23,316	Rate	Years	Interest
July 1979 to June 1980	0.08	1	1,865.28
July 1980 to June 1982	0.12	2	5,595.84
July 1982 to June 1986	0.15	4	13,989.60
July 1986 to June 1987	0.105	1	2,448.18
July 1987 to June 1988	0.095	1	2,215.02
July 1988 to June 1989	0.10	1	2,331.60
			28,445.52

1980 Back Pay: $32,960	Rate	Years	Interest
July 1980 to June 1982	0.12	2	7,910.40
July 1982 to June 1986	0.15	4	19,776.00
July 1986 to June 1987	0.105	1	3,460.80

1980 Back Pay: $32,960	Rate	Years	Interest
July 1987 to June 1988	0.095	1	3,131.20
July 1988 to June 1989	0.10	1	3,296.00
			37,574.40

. Combining these totals yields the total amount of prejudgment interest on the back pay award:

80,209.36
6,734.99
4,117.76
9,226.11
28,445.52
37,574.40
166,308.14

Table 9: Prejudgment Interest on the Front Pay Award

1981 Front Pay: $36,256	Rate	Years	Interest
July 1981 to June 1982	0.12	1	4,350.72
July 1982 to June 1986	0.15	4	21,753.60
July 1986 to June 1987	0.105	1	3,806.88
July 1987 to June 1988	0.095	1	3,444.32
July 1988 to June 1989	0.010	1	3,625.60
			36,981.12

1982 Front Pay: $39,882	Rate	Years	Interest
July 1982 to June 1986	0.15	4	23,929.20
July 1986 to June 1987	0.105	1	4,187.61
July 1987 to June 1988	0.095	1	3,788.79
July 1988 to June 1989	0.10	1	3,988.20
			35,893.80

1983 Front Pay: $43,870	Rate	Years	Interest
July 1983 to June 1986	0.15	3	19,741.50
July 1986 to June 1987	0.105	1	4,606.35
July 1987 to June 1988	0.095	1	4,167.65
July 1988 to June 1989	0.10	1	4,387.00
			32,902.50

1984 Front Pay: $48,257	Rate	Years	Interest
July 1984 to June 1986	0.15	2	14,447.10
July 1986 to June 1987	0.105	1	5,066.99
July 1987 to June 1988	0.095	1	4,584.42
July 1988 to June 1989	0.10	1	4,825.70
			28,954.21

1985 Front Pay: $53,082	Rate	Years	Interest
July 1985 to June 1986	0.15	1	7,962.30
July 1986 to June 1987	0.105	1	5,573.61
July 1987 to June 1988	0.095	1	5,042.79
July 1988 to June 1989	0.10	1	5,308.20
			23,886.90

1986 Front Pay: $58,391	Rate	Years	Interest
July 1986 to June 1987	0.105	1	6,131.06
July 1987 to June 1988	0.095	1	5,547.15
July 1988 to June 1989	0.10	1	5,839.10
			17,517.30

1987 Front Pay: $64,230	Rate	Years	Interest
July 1987 to June 1988	0.095	1	6,101.85
July 1988 to June 1989	0.10	1	6,423.00
			12,524.85

1988 Front Pay: $70,653	Rate	Years	Interest
July 1988 to June 1989	0.10	1	7,065.30

1989 Front Pay: $38,859	Rate	Years	Interest
January 1989 to June 1989	0.10	½	1,942.95

Combining these totals yields the total amount of prejudgment interest on the front pay award:

36,981.12
35,893.80
32,902.50
28,954.21
23,886.90
17,517.30
12,524.85
7,065.30
1,942.95

197,668.93

Table 10: Distribution of the Back Pay Award Among Class Members

Table 12 indicates the length of service of each class member, and the amount of the member's back pay recovery based on her length of service. The total length of service of all class members is 10,417.5 months. The total back pay award, plus interest, is $289,362.14. Therefore, for each month's service, a class member receives $27.78.

Name	Months of Service	Recovery
J. Alonzo	99.5	$ 2,714.36
B. Atkins	13.0	361.14
D. Belk	49.0	1,361.22
K. Bowdish	165.0	4,583.70
B. Bradley	46.0	1,277.88
D. Brannon	130.0	3,611.40
S. Brannon	175.5	4,875.39
L. Brewer	20.0	555.60
K. Briggs	13.5	375.03
M. Brown	291.0	8,083.98
A. Calvin	167.0	4,639.26
J. Campbell	13.5	375.03

Name	Months of Service	Recovery
L. Campbell	169.5	4,708.71
D. Carpenter	86.5	2,402.97
P. Chase	32.0	888.96
H. Cipolla	19.0	527.82
K. Cook	66.0	1,833.48
D. DeGraeves	113.0	3,139.14
J. Deutman	245.0	6,806.10
B. Draskovic	56.0	1,555.68
J. Fanning	250.0	6,945.00
B. Fowler	27.5	763.95
S. Fuller	114.0	3,166.92
J. Fuhrman	11.0	305.58
M. Garth	71.0	1,972.38
A. Gomez	59.0	1,639.02
B. Grecian	21.0	583.38
M. Groh	218.5	6,069.93
C. Grosdidier	157.5	4,375.35
C. Guerra	24.0	666.72
P. Gulley	110.0	3,055.80
B. Hartsell	179.0	4,972.62
N. Herring	19.0	527.82
D. Hodge	113.0	3,139.14
G. Holland	80.0	2,222.40
H. Hood	103.0	2,861.34
J. Hotchkiss	151.0	4,194.78
I. Hueston	291.0	8,083.98
D. Johnson	361.0	10,028.58
M. Johnston	28.0	777.84
R. Johnston	216.5	6,014.37
P. Jones	157.0	4,361.46
V. Kasenurm	23.5	652.83
J. Keck	14.0	388.92
S. Kilgore	189.5	5,264.31
B. Lacy	13.0	361.14
B. Larken	26.0	722.28
C. Martin	154.0	4,278.12
M. McCracken	111.0	3,083.58
I. Mendez	75.0	2,083.50
B. Miller	206.5	5,736.57
M. Miller	262.5	7,292.25
N. Monroe	8.5	236.13
G. Moore	258.0	7,167.24
B. O'Dell	11.5	319.47
A. Onka	94.0	2,611.32
R. Pendergrass	21.0	583.38
D. Pittman	128.0	3,555.84
D. Pitts	62.0	1,722.36
P. Pitts	34.5	958.41
S. Reed	234.0	6,500.52
B. Richardson	20.0	555.60
D. Rinker	18.5	513.93
S. Rogers	358.0	9,945.24
J. Rupp	175.5	4,875.39
J. Schooler	184.5	5,125.41
K. Shepherd	216.0	6,000.48
C. Smerchek	212.0	5,889.36
G. Smith	193.0	5,361.54
S. Spencer	31.0	861.18
M. Spidell	12.5	347.25
L. Stanley	265.0	7,361.70
R. Stroth	154.0	4,278.12

Name	Months of Service	Recovery
E. Somers	215.0	5,972.70
D. Swope	220.0	6,111.60
D. Thorington	159.0	4,417.02
M. Tomlin	24.0	666.72
S. Tribble	87.0	2,416.86
E. Volner	306.0	8,500.68
C. Walsh	160.0	4,444.80
B. Warren	19.5	541.71
L. Welker	20.5	569.49
B. Wienke	120.0	3,333.60
W. Wilhoite	189.0	5,250.42
C. Williams	135.0	3,750.30
R. Williams	26.0	722.28
A. Wynne	200.0	5,556.00
D. Yates	12.0	333.36
P. Yurchak	28.0	777.84

Table 11: Yearly Front Pay Awards, Including Interest, To Be Divided Among the Class

The following indicates the yearly front pay awards, including prejudgment interest, which are to be divided among the members of the class who are still employed by the defendant at the close of the year in question.

Year	Front Pay	Interest	Total
1981	36,256.00	36,981.12	73,237.12
1982	39,882.00	35,893.80	75,775.80
1983	43,870.00	32,902.50	76,772.50
1984	48,257.00	28,954.21	77,211.21
1985	53,082.00	23,886.90	76,968.90
1986	58,391.00	17,517.30	75,908.30
1987	64,230.00	12,524.85	76,754.85
1988	70,653.00	7,065.30	77,718.30
1989	38,859.00	1,942.95	40,801.95

The ESTATE OF Janice D. PITRE, individually and on behalf of all fellow employees and past employees of the defendant who are similarly situated, Plaintiff,

v.

WESTERN ELECTRIC COMPANY, INC., Defendant.

Civ. A. No. 76-218-C2.

United States District Court,
D. Kansas.

April 16, 1990.

Ronald J. Stites, Sandra Midkiff, Kansas City, Mo., Michael E. Callen, Kansas City, Kan., for plaintiff.

Spencer, Fane, Britt & Browne, Jack L. Whitacre, Stanley E. Craven, Kansas City, Mo., Lawrence Ferree, Overland Park, Kan., for defendant.

MEMORANDUM AND ORDER

EARL E. O'CONNOR, Chief Judge.

Before the court in the above-captioned matter are plaintiff's proposed journal entry, defendant's objections thereto, and plaintiff's motion concerning attorney's fees.

By order dated July 10, 1989, 719 F.Supp. 966 ("the July 10 order") the court directed plaintiff to file and serve on defendant a proposed journal entry regarding distribution of the front pay award. Plaintiff has done so, and defendant objects to plaintiff's proposal, inasmuch as it provides for a continuation of front pay until women

comprise fifty percent (50%) of each M-level and the section chief level. Defendant claims that the July 10 order should be construed as simply awarding a lump sum for front pay. Plaintiff has correctly interpreted the court's order, and so defendant's objection is overruled. Pursuant to a stipulation of the parties, however, the court hereby vacates that part of its July 10 order setting forth the distribution of back pay and adopts in lieu thereof the attached Table 10.

Front pay for which defendant is liable through June 30, 1989, shall be distributed in accordance with the attached Table 12. Defendant's liability for front pay shall continue until women comprise fifty percent (50%) of each M-level and the section chief level. On or before January 15 of each year, beginning in 1990, defendant shall report to the court and the plaintiff the distribution of males and females in each salary grade and section chief level for the previous year, the names of class members who remain employed, and the dates of separation of former members. Front pay as calculated in accordance with the formula set forth in the July 10 order, if owed, shall be paid to the class on or before January 31 of each year.

Postjudgment interest accumulating on the back pay amounts owed as of June 30, 1989, shall be distributed to all class members in the same manner as the back pay amounts contained in the attached Table 10. Postjudgment interest accumulating on the front pay amounts owed as of June 30, 1989, shall be distributed in the same manner as annual front pay amounts, set forth above.

In light of our disposition of defendant's objections to the proposed journal entry, plaintiff's motion concerning attorney's fees is moot and hereby denied. This order shall constitute the court's journal entry.

IT IS SO ORDERED.

Table 10: Distribution of the Back Pay Award Among Class Members

Table 10 indicates the length of service of each class member, and the amount of the member's back pay recovery based on her length of service. The total length of service of all class members is 9,838.5. The total back pay award, plus interest, is $289,362.14. Therefore, for each month's service, a class member receives $29.41. The difference between the sum of each member's share and the defendant's total liability is $111.76. That amount is divided per capita among the class members ($1.33 each).

Name	Months of Service	Recovery
J. Alonzo	99.5	$ 2,927.63
B. Atkins	13.0	383.66
D. Belk	49.0	1,442.42
K. Bowdish	165.0	4,853.98
B. Bradley	46.0	1,354.19
D. Brannon	145.0	4,265.78
S. Brannon	175.5	5,162.79
K. Briggs	13.5	398.37
M. Brown	291.0	8,559.64
A. Calvin	167.0	4,912,80
J. Campbell	13.5	398.37
L. Campbell	169.5	4,986.33

P. Chase	32.0	942.45
H. Cipolla	19.0	560.12
K. Cook	66.0	1,942.39
D. DeGraeve	113.0	3,324.66
J. Deutman	245.0	7,206.78
B. Draskovic	56.0	1,648.29
J. Fanning	250.0	7,353.83
S. Fuller	114.0	3,354.07
J. Fuhrman	11.0	324.84
M. Garth	71.0	2,089.44
A. Gomez	59.0	1,736.52
B. Grecian	75.0	2,107.08
M. Groh	218.5	6,427.42
C. Grosdidier	157.5	4,633.41
P. Gulley	110.0	3,236.43
B. Hartsell	179.0	5,265.72
N. Herring	19.0	560.12
D. Hodge	113.0	3,324.66
G. Holland	80.0	2,354.13
H. Hood	103.0	3,030.56
J. Hotchkiss	151.0	4,442.34
I. Hueston	291.0	8,559.64
D. Johnson	126.0	3,706.99
M. Johnston	28.0	824.81
R. Johnston	216.5	6,368.60
P. Jones	157.0	4,618.70
J. Keck	14.0	413.07
S. Kilgore	189.5	5,573.20
C. King	24.5	721.88
B. Lacy	13.0	383.66
B. Larken	26.0	765.99
C. Martin	77.5	2,280.61

M. McCracken	111.0	3,265.84
I. Mendez	75.0	2,207.08
B. Miller	206.5	6,074.50
M. Miller	262.5	7,721.46
N. Monroe	8.5	251.32
G. Moore	258.0	7,589.11
B. O'Dell	23.5	692.47
A. Onka	94.0	2,765.87
R. Pendergrass	21.0	618.94
D. Pittman	128.0	3,765.81
D. Pitts	62.0	1,824.75
P. Pitts	34.5	1,015.98
S. Reed	234.0	6,883.27
B. Richardson	20.0	589.53
D. Rinker	18.5	545.42
S. Rogers	358.0	10,530.11
J. Rupp	175.5	5,162.79
J. Schooler	79.0	2,324.72
K. Shepherd	216.0	6,353.89
C. Smerchek	212.0	6,236.25
G. Smith	193.0	5,677.46
E. Somers	215.0	6,324.48
M. Spidell	12.5	368.96
L. Stanley	265.0	7,794.98
R. Stroth	154.0	4,530.47
D. Swope	220.0	6,471.53
D. Thorington	159.0	4,677.52
M. Tomlin	24.0	707.17
S. Tribble	87.0	2,560.00
E. Volner	306.0	9,000.79
C. Walsh	122.0	3,589.35
B. Warren	19.5	574.88

L. Welker	20.5	604.23
B. Wienke	120.0	3,530.53
W. Wilhoite	189.0	5,559.82
C. Williams	135.0	3,971.68
R. Williams	26.0	765.99
A. Wynne	200.0	5,883.33
D. Yates	12.0	354.25
P. Yurchak	9.0	266.02

Table 12: Distribution of the Front Pay Award Among Class Members

Table 12 indicates the total amount of each member's front pay recovery based on her length of service. Defendant's liability for each year beginning in 1981 is divided among class members who remain employed for each such full year. The difference between the calculations of amounts distributed annually and the defendant's total liability of $651,148.93 is $95.10. That amount is divided per capita among the class members ($1.59 each).

Name	Front Pay Amount
J. Alonzo	$12,011.70
B. Atkins	517.58
K. Bowdish	16,999.50
D. Brannon	14,182.22
S. Brannon	17,799.10
K. Briggs	525.92
M. Brown	7,895.37
A. Calvin	17,142.80
J. Campbell	941.23
L. Campbell	4,850.59

H. Cipolla	617.60
J. Fanning	4,468.37
J. Fuhrman	5,272.40
B. Grecian	10,146.00
C. Grosdidier	16,428.40
P. Gulley	12,811.25
B. Hartsell	18,065.60
N. Herring	5,881.60
D. Hodge	13,039.70
H. Hood	12,278.20
J. Hotchkiss	6,243.64
I. Hueston	26,594.40
D. Johnson	8,880.03
M. Johnston	1,304.59
R. Johnston	20,921.25
P. Jones	16,390.30
J. Keck	5,500.85
S. Kilgore	18,865.20
B. Lacy	1,497.82
B. Larken	6,414.65
M. McCracken	9,804.78
I. Mendez	10,146.00
B. Miller	20,159.75
M. Miller	24,434.15
N. Monroe	815.93
G. Moore	24,081.45
B. O'Dell	6,224.30
A. Onka	8,760.81
R. Pendergrass	6,033.90
D. Pittman	14,181.95
S. Reed	4,201.65
B. Richardson	5,957.75

D. Rinker	3,223.40
S. Rogers	9,574.39
J. Rupp	17,799.10
K. Shepherd	1,916.79
C. Smerchek	16,007.19
G. Smith	19,131.70
E. Somers	16,191.83
M. Spidell	207.39
L. Stanley	22,691.42
R. Stroth	16,161.85
D. Swope	21,187.75
D. Thorington	6,518.76
E. Volner	8,271.27
C. Walsh	5,246.33
B. Warren	5,919.70
L. Welker	3,328.64
W. Wilhoite	18,827.10
A. Wynne	19,664.75

Janice D. PITRE, individually and on behalf of all fellow employees and past employees of the defendant who are similarly situated, Plaintiff-Appellee Cross-Appellant,

v.

WESTERN ELECTRIC COMPANY, INC., Defendant-Appellant Cross-Appellee.

Nos. 85-2083, 85-2084.

United States Court of Appeals,
Tenth Circuit.

March 29, 1988.

Stanley E. Craven (Jack L. Whitacre with him on the brief), of Spencer, Fane, Britt & Browne, Kansas City, Mo., for defendant-appellant cross-appellee Western Elec. Co., Inc.

Steven L. Hobson, Liberty, Mo. (Ronald J. Stites, Kansas City, Mo. with him on the brief), for plaintiff-appellee cross-appellant Janice D. Pitre.

Before SEYMOUR, McWILLIAMS, and BARRETT, Circuit Judges.

SEYMOUR, Circuit Judge.

Janice Pitre brought this action individually and on behalf of a class of women employees against Western Electric Company, alleging gender-based discrimination in violation of 42 U.S.C. §§ 2000e *et seq.* (1982) (Title VII). The district court resolved the liability issues in favor of Pitre and the class, and formulated a remedy. Western Electric appeals the determination that it violated Title VII by discriminating against Pitre and the class. Both parties appeal the remedy. We affirm the district court's

liability findings, and reverse and remand for reconsideration of the remedy in light of this opinion.

I.

Western Electric's service and installation plants in Merriam and Lenexa, Kansas, employed nonsalaried, salaried, and management personnel during the relevant time period. The salaried employees were divided into five levels, M-10, M-20, M-30, M-40, and M-50. These jobs and the lowest management position, section chief, are at issue here. Typically, employees began at the lower levels and progressively advanced. Section chiefs, however, came not only from the M-50 salaried level but also from nonsalaried and occasionally lower salaried levels. In 1975, Pitre was demoted from her job as a section chief to an M-50 classification.

After exhausting administrative remedies, Pitre brought this action alleging that her demotion violated Title VII. In 1977, she amended her complaint to allege class-wide discrimination against all female employees in the five salary grades and the section chief position in assignment, promotion, downgrading, and layoff. The district court certified the class and determined that the relevant period had begun December 11, 1974, 180 days before Pitre initially filed a complaint with the Equal Employment Opportunity Commission. Pitre's theory of liability was essentially that Western Electric's all-male management personnel held discriminatory attitudes toward women in the lower salary grades. The company responded that the distribution of men and women

resulted from historical practice prior to the relevant period and/or nondiscriminatory company policies.

After a full trial, the district court held in favor of the class and Pitre individually. Rec., vol. I, doc. #126 (District Court Memorandum and Order on Liability) (hereinafter *Pitre* I). Although the court found that economic conditions necessitated demotions during the mid-1970s, it also found that Western Electric's demotion and layoff policy discriminated against women. This discrimination continued into the late 1970s when the company began to promote employees.

The parties agreed to a back pay award for Pitre, but they were unable to resolve the class relief or prejudgment interest issues. Consequently, the court imposed a formula for determining interest and a class back pay and front pay award. Rec., vol. I, doc. #134 (District Court Memorandum and Order on Remedy) (hereinafter *Pitre* II). The court also enjoined Western Electric from continuing to discriminate. The company appeals the court's liability findings. Both parties appeal the class remedy.

II.

Western Electric begins by advancing three arguments why the district court's decision can and should be reversed as a matter of law. First, the company claims that plenary review is appropriate because the district court's conclusions were not based on credibility determinations. Second, it asserts that because much of the evidence offered by Pitre involved discrimination prior to the period at issue in the case, the court's findings on the ultimate issue are erroneous as a matter of law regardless

of the standard of review. Third, the company argues that because the class did not show significant statistical disparity between male and female demotion and promotion practice, the class claim must fail as a matter of law. We address these contentions separately.

A. The Standard of Review

The analytical framework for trying a Title VII case is now well established. First, the plaintiff must present a prima facie case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). This burden is satisfied by presenting a scenario that on its face suggests the defendant more likely than not discriminated against the plaintiff. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1981). "The burden of establishing a prima facie case of disparate treatment is not onerous." *Id.* If this initial burden is fulfilled, the defendant must set forth nondiscriminatory justifications for its allegedly discriminatory practices. *Id.* at 254-55, 101 S.Ct. at 1094-95. The burden of production placed on the defendant at this stage can be fulfilled by presenting nondiscriminatory reasons for its actions that are specific enough to provide the plaintiff with "a full and fair opportunity to demonstrate pretext." *Id.* at 256, 101 S.Ct. at 1095. "General assertions of good faith or of hiring only the best applicants . . . are insufficient." *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, 817 (5th Cir.), *cert. denied*, 459 U.S. 1038, 103 S.Ct. 452, 74 L.Ed.2d 605 (1982). The plaintiff then bears the ultimate burden of proving a statutory violation. This burden can be satisfied

either "directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256, 101 S.Ct. at 1095. Once the district court makes the ultimate determination as to whether the employer violated the statute, its legal conclusions in regard to the first two stages of evaluating the evidence become irrelevant on appeal. *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715, 103 S.Ct. 1478, 1481-82, 75 L.Ed.2d 403 (1983).

Neither party questions the district court's application of these legal standards to the facts of this case. Rather, Western Electric contends that in applying this law to the facts, the district court was not required to make credibility determinations. It maintains that the application of legal standards to undisputed documentary and statistical evidence results in mixed questions of fact and law. Such questions, according to Western Electric, are entitled to significantly less deference than purely factual determinations. Western Electric's argument, however, is unequivocally undermined by the language of the cases it cites.

The issue in a disparate treatment case such as this one is whether the employer intended to discriminate against the employee. *Aikens*, 460 U.S. at 715, 103 S.Ct. at 1481-82. "In short, the district court must decide which party's explanation of the employer's motivation it believes." *Id.* at 716, 103 S.Ct. at 1482. This decision is "both sensitive and difficult," *id.*, and is therefore treated as a "pure question of fact subject to Rule 52(a)'s clearly erroneous-standard. It is not a question of law and not a

mixed question of law and fact." *Pullman-Standard v. Swint*, 456 U.S. 273, 288, 102 S.Ct. 1781, 1789-90, 72 L.Ed.2d 66 (1982). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. . . . This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 1511-12, 84 L.Ed.2d 518 (1985).[1] The Court thus concluded that "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 573-74, 105 S.Ct. at 1511.

B. Evidence of Discrimination Prior to the Period in Question

Western Electric argues that the district court must have relied heavily upon evidence of discrimination that

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[1] The *Anderson* Court justified this conclusion by asserting that "[t]he rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise." *Anderson*, 470 U.S. at 574, 105 S.Ct. at 1512. Although even the trial judge may not always be confident that he "knows" what happened, he is in the best position to "determine whether the plaintiff has succeeded in presenting an account of the facts that is more likely to be true than not." *Id.* at 580, 105 S.Ct. at 1515.

occurred prior to the relevant period, because only from this evidence could discrimination have been proven. It argues that under *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), such evidence can serve only as "background" information, and that the district court's nearly exclusive reliance on such evidence to find a pattern and practice of discrimination within the relevant period requires us to reverse.

Evans has recently been explained in *Bazemore v. Friday*, 478 U.S. 385, 106 S.Ct. 3000, 3007 n. 6, 92 L.Ed.2d 315 (1986), where the Court noted that there simply had been no evidence of a current Title VII violation in *Evans*. The Court made clear in *Bazemore* that evidence of pre-Act discrimination is "quite probative" to establish that current conduct is discriminatory. *Id.* 106 S.Ct. at 3010 n. 13. Particularly when a company's decision-making process has not changed, evidence of prior discrimination "might in some circumstances support the inference that such discrimination continued." *Id.* at 3010 (quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 309 n. 15, 97 S.Ct. 2736, 2742-43 n. 15, 53 L.Ed.2d 768 (1977)). Because the decision-making process at Western Electric had undergone virtually no change before this case began, the district court properly considered past discrimination as evidence of current discriminatory intent.

C. *Statistical Evidence of Class-Wide Discrimination*

Western Electric contends that class-wide discrimination cannot, as a matter of law, be established here in the absence of significant statistical evidence. It argues that the district court found all of the statistics presented by

Pitre uninformative except for those dealing with the percentage of women demoted from each job classification. The only statistics on which the court relied, the company contends, were legally irrelevant and meaningless because, under widely accepted modes of statistical analysis, the percentages are too insignificant to rule out mere chance as a basis for the slight disparity between the men and women demoted.

The Title VII violation in this case arose from the allegedly disparate treatment of women rather than the disparate impact of a particular policy.

> " 'Disparate treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment."

International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 1854-55 n. 15, 52 L.Ed.2d 396 (1977). In order to prove a pattern or practice of discrimination, a plaintiff must show more than accidental or sporadic incidents of discrimination; she must show that "discrimination was the company's standard operating procedure – the regular rather than the unusual practice." *Id.* at 336 & n. 16, 97 S.Ct. at 1855 & n. 16; *accord Bazemore*, 106 S.Ct. at 3008.

Although statistics may be useful to show differences in treatment and to establish a pattern and practice, they are clearly not required, especially when the sample size is too small to produce meaningful results. *See Teamsters*,

431 U.S. at 339-40, 97 S.Ct. at 1856-57; *see also Bazemore*, 106 S.Ct. at 3009 ("A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence."); *Hazelwood School Dist. v. United States*, 433 U.S. 299, 311 n. 17, 97 S.Ct. 2736, 2743 n. 17, 53 L.Ed.2d 768 (1977) ("precise calculations of statistical significance [are not] necessary in employing statistical proof"); *Catlett v. Missouri Highway & Transp. Comm'n*, 828 F.2d 1260, 1265 (8th Cir.1987). "If the statistical disparity is insufficient alone to establish a prima facie case, the plaintiff may get over his or her initial hurdle by combining statistics with historical, individual, or circumstantial evidence." *Payne*, 673 F.2d at 817; *see also Catlett*, 828 F.2d at 1265; *EEOC v. American Nat'l Bank*, 652 F.2d 1176, 1189 (4th Cir.1981), *cert. denied*, 459 U.S. 923, 103 S.Ct. 235, 74 L.Ed.2d 186 (1982); *Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945, 954-55 (10th Cir.1980). Although the small sample sizes in this case impaired the effective use of statistics, Pitre presented ample direct and circumstantial evidence of discrimination.

III.

Western Electric also attacks as clearly erroneous the district court's ultimate findings of statutory violations in its demotion and promotion practices.

A. Statistical Evidence

Western Electric first argues long and hard that the district court's findings of discrimination are clearly erroneous because "no legally significant statistical disparity"

was or could have been shown from the statistics on which the court relied. Although we have already determined that statistics are unnecessary to prove a disparate treatment case, reliance by the court on irrelevant statistical evidence (like reliance on any irrelevant evidence) could render all or part of its findings clearly erroneous. Thus, we must examine the court's treatment of the statistical evidence.

When a plaintiff presents statistics, their relevance should not be determined through the rigid application of statistical analysis alone. *Cf. Payne*, 673 F.2d at 817. "[A]ll of the evidence, statistical and nonstatistical, tending to establish a prima facie case should [be] assessed on a cumulative basis." *American Nat'l Bank*, 652 F.2d at 1189. "[A]s long as the court may fairly conclude, in light of all the evidence, that it is more likely than not that impermissible discrimination exists, the plaintiff is entitled to prevail." *Bazemore*, 106 S.Ct. at 3009; *Catlett*, 828 F.2d at 1265.

The district court in this case specifically asserted that it did not rely exclusively on statistical evidence for any part of its decision. Rather, it noted that it recognized the limited value of the statistics provided by the parties. The court's opinion makes clear that it did rely heavily on the general discriminatory atmosphere at Western Electric and the anecdotal descriptions of individual incidents of discrimination.

The court did, however, rely to some extent on percentage statistics that showed that "women suffered a disproportionate number of downgradings in each

M-level category."[2] *Pitre* I at 27. Western Electric argues that these statistics are legally irrelevant and therefore the court's reliance upon them to any extent renders its finding on the company's demotion policy clearly erroneous. In defining legal relevance, the company contends that statistically significant results for social scientists

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[2] The district court included the following chart in its findings:

"The percentages of men and women are illustrated in the table below.*

Grade Level	% Females In Grade	% Females Of Those Down-graded	% Males In Grade	% Males Of Those Down-graded
M-50	4%	17%	96%	83%
M-40	46%	66%	53%	33%
M-30**	84%	87%	16%	12%
M-20	69%	73%	31%	27%
M-10	90%	100%	10%	0%

* Employees transferring to the hourly universe are excluded from the percent of those downgraded. The number of transfers totaled 13; consisting of one (1) male in the M-50 level, two (2) males in the M-40 level, one (1) male at the M-10 level and nine (9) females at the M-10 level. The chart also does not reflect second downgradings. Women suffered the brunt of second downgradings, and the inclusion of such data would further amplify the disproportionate impact on women.

** Includes two (2) women who took voluntary layoffs rather than being downgraded. One (1) of the males that is shown downgraded by the records and this chart, was given protected-pay treatment and suffered no loss in pay from the downgrade."

Pitre I, at 27.

must exceed "two or three standard deviations." It therefore urges us to conclude that "legally significant statistics" must be at least that precise. Answering and Reply Brief of Defendant/Appellant Western Electric Co., Inc. at 6. The company's reply brief shows the standard deviations for the demotions for each job classification and demonstrates that each is less than "two or three." *Id.* at 7a.

At least one other circuit has addressed an argument similar to Western Electric's. *See American Nat'l Bank*, 652 F.2d at 1191. In that case, the court pointed out that statistics that are insignificant to the social scientist may well be relevant to a court. *Id.* at 1192. As the Fourth Circuit recognized, while social scientists search for certainty, the trier of fact in a Title VII case need only find that discrimination is more likely than not. *Id.* "Another factor suggesting great caution in making fine-tuned use of standard deviation analysis in these cases is that its reliability diminishes in ways probably not susceptible of precise handling by courts as the binomial distribution sample diminishes in size." *Id.* at 1193 n. 12. The samples in this case were clearly too small to make standard deviations relevant. The higher employment classifications contained so few women that a management decision that affected all of them (as the demotions did for the M-50 classification) or none of them would not have satisfied a social scientist.

When dealing with such small samples, courts could simply have forbidden the introduction of statistics. Instead, they have chosen to allow their introduction, but required that they be interpreted carefully and in conjunction with all other relevant evidence. *See id.* This

court has applied a common sense approach. In general, a finding of discrimination based generally on a showing of discriminatory acts and attitudes is not clearly erroneous because the district court also considered statistics that a social scientist would find insignificant. *See Fitzgerald*, 624 F.2d at 954-55. From our review of the record and the district court's opinion, we conclude that these principles were properly applied. The court's finding of liability in Western Electric's demotion policy was not clearly erroneous solely because it relied in part on the statistics in question.

B. Specific Evidence of Discrimination

Western Electric disputes the specific findings of actual discrimination, arguing that its reasons for downgrading and making the subsequent promotions were legitimate and nondiscriminatory. In some situations, the company argues that certain facts relied upon by the court either do not indicate discrimination or that other undisputed facts exist which rule out the possibility of discrimination. In other situations, it argues that the evidence on the record simply does not lead to the conclusion the district court reached.

Before responding to Western Electric's points, we must articulate the very relevant evidence of discrimination that the company attempts to wish away. The district court articulated a long history of discrimination against the female salaried employees at the Lenexa and Merriam facilities, resulting in the clustering of women in the

lower-paying salary grades.[3] There is substantial evidence in the record that management decisions relating to hiring, assignment, job performance, and promotion were based on subjective criteria. Job openings were not posted, and advancement depended on the recommendation of supervisors, who were overwhelmingly male during the relevant period. In addition, no grievance or appeal mechanism existed to challenge the promotion decisions.

Pitre also offered evidence that Western Electric's management personnel, who made promotion and demotion decisions throughout the relevant period, held discriminatory attitudes toward women. Even some members of management admitted that discriminatory attitudes towards women existed until at least the late

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[3] The distribution of males and females in the salary and management levels as of December 31, 1974, were as follows:

	Males		Females	
	No.	%	No.	%
M-10	2	11	17	89
M-20	4	31	9	69
M-30	4	17	19	83
M-40	16	57	12	43
M-50	24	92	2	8

	Males		Females	
	No.	%	No.	%
Section Chief	39	95	2	5
Department Chief	39	95	0	0
Assistant Manager	2	100	0	0
Manager	1	100	0	0

Pitre I, at 21.

1960s. Specifically, some thought women could not handle certain technical jobs. *Cf. Thorne v. City of El Segundo*, 726 F.2d 459, 468 (9th Cir.1983) ("A refusal to hire a woman because of a sex-stereotyped view of her physical abilities is the kind of indivious discrimination that violates Title VII."), *cert. denied*, 469 U.S. 979, 105 S.Ct. 380, 83 L.Ed.2d 315 (1984). Pitre presented numerous examples in which these attitudes were acted upon either through beneficial treatment for men in promotion and demotion decisions or through harassment of women on the job. Some women testified to discriminatory application of the company's overtime, temporary upgrade, and personal leave policies. One woman testified that she was told a promotion would entail night work when in fact the man who received the position was not required to work evenings. Others testified regarding sexual harassment. "[A] plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 2405-06, 91 L.Ed.2d. 49 (1986). Evidence of harassment, therefore, helps create an inference of discrimination in Western Electric's promotion and demotion practices. *Cf. McDonnell Douglas*, 411 U.S. at 804, 93 S.Ct. at 1825 (employer's treatment of employee during term of employment useful evidence in determining whether non-discriminatory justification is pretextual).

Finally, Pitre points out that over fifteen years after the passage of Title VII, women were still receiving far less than half of the promotions to upper level jobs which

did not require special skill or education.[4] Although the adoption of Title VII did not require the immediate equalization of male/female disparity in upper level jobs, it is implicit in the district court's findings that in the decade before the slowdown requiring downgradings, Western Electric had the opportunity to promote more than two women to the position of section chief or to integrate the sexes more adequately in upper level positions.

Notwithstanding the above evidence, Western Electric contests several of the district court's specific factual findings. The company argues that because it followed its written Corporate Instruction consistently in demoting employees, the district court could not conclude that it used the Instructions as a pretext for discrimination. The company contends that in choosing the time-in-grade rather than time-in-employment standard, as was its

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[4] A continuing disparity in promoting women to upper level positions is relevant evidence of discrimination.

> "We presume [promoting more men than women to upper level positions], if otherwise unexplained, [is] more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reason, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reasons, based his decision on an impermissible consideration. . . ."

Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577, 98 S.Ct. 2943, 2950, 57 L.Ed.2d 957 (1978) (citations omitted).

option under the Instruction, it could not have been discriminating because choosing either seniority system would have resulted in a slightly greater number of female demotions than male.

Western Electric apparently believes that any policy facially based on seniority cannot, if consistently applied, violate Title VII because of section 703(h), 42 U.S.C. 2000e-2(h). This exception, however, protects bona fide seniority systems adopted with no intent to discriminate pursuant to collective bargaining agreements. *See American Tobacco Co. v. Patterson*, 456 U.S. 63, 102 S.Ct. 1534, 71 L.Ed.2d 748 (1982) ("Seniority provisions are of 'overriding importance' in collective bargaining and they 'are universally included in these contracts.' "). As the district court noted, the salaried employees in this case had no say in the Corporate Instruction on which the demotion policy was based. In addition, the seniority plan was applied far less formally and consistently than a collectively bargained plan would have been. *Cf. Payne*, 673 F.2d at 827 (informal and erratic application falls far short of bona finde [sic] seniority system). In such a situation, the employer's claim that seniority considerations justified apparently discriminatory demotion practices may well be considered pretextual. *Id.* The employer is entitled to reorganize its company as necessary to suit the current needs of its business; however, it "is not free to exercise that right in a manner that prevents a qualified member of a protected class from retaining a position that he or she was previously performing satisfactorily." *Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810, 814 (8th Cir. 1983).

Moreover, there were deviations from use of time-in-grade in the demotion process. Western Electric attempts to explain these away as instances where other factors exempted the particular employee from demotion. The Corporate Instruction, it points out, required consideration of numerous factors other than seniority including " 'ability, performance, potentiality, . . . and the needs of the business.' " Brief of Defendant/Appellant at 26. The district court found that these other highly subjective factors also served as pretexts for discrimination. The potential for discrimination in a situation where numerous subjective factors are allegedly considered was explained in *Grano v. Department of Dev. of City of Columbus*, 699 F.2d 836 (6th Cir.1983):

> "Courts have frequently noted that subjective evaluation processes intended to recognize merit provide ready mechanisms for discrimination. Moreover, the legitimacy of the articulated reason for the employment decision is subject to particularly close scrutiny where the evaluation is subjective and the evaluators themselves are not members of the protected minority."

Id. at 837 (citations omitted); *see also Segar v. Smith*, 738 F.2d 1249, 1290 (D.C.Cir. 1984), *cert. denied*, 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985); *Burrus v. United Tel. Co.*, 683 F.2d 339, 342 (10th Cir.), *cert. denied*, 459 U.S. 1071, 103 S.Ct. 491, 74 L.Ed.2d 633 (1982); *Payne*, 673 F.2d at 826; *Stewart v. General Motors Corp.*, 542 F.2d 445, 450 (7th Cir.1976), *cert. denied*, 433 U.S. 919, 97 S.Ct. 2995, 53 L.Ed.2d 1105 (1977). "While some subjectivity is inevitable in filling [upper level] jobs . . . , the total lack of objective standards . . . could only reinforce the prejudices, unconscious or not, which Congress in Title VII

sought to eradicate as a basis for employment." *Stewart*, 542 F.2d at 450. Thus, in this circuit, "the rejection of an otherwise qualified individual on the basis of subjective considerations entitles the plaintiff 'to the benefit of an inference of discrimination.' " *Burrus*, 683 F.2d at 342 (quoting *Bauer v. Bailar*, 647 F.2d 1037, 1046 (10th Cir. 1981)).

We recognize that when management considers individuals for upper level positions subjective factors must play some role. Their use does not per se constitute discrimination. In this case, however, those making the subjective decisions were men, at least some of whom held discriminatory attitudes and who had participated in past discrimination. *Cf. Payne*, 673 F.2d at 826. The record also reflects specific discriminatory incidents. When we consider that without the subjective explanations, Western Electric cannot account for the inconsistent application of a seniority policy that was itself found to be a pretext for discrimination, we conclude that the district court properly considered the company's reliance on subjective evaluation methods to be additional evidence of discrimination.

Western Electric similarly argues that its policy of upgrading those employees previously downgraded before promoting new employees was consistently applied and actually benefited women since more of them had been downgraded. When we focus on upper level positions where the discrimination predominately occurred, however, the company's argument loses force. Pitre, who was demoted from section chief, was never repromoted to her old job. Western Electric explains this failure by noting that its policy of reupgrading was not

applied to management personnel. Since the M-50 level, the highest nonmanagement position, was predominantly male when the downgrading began, adopting a reupgrade policy for that level clearly disadvantaged women. The district court could have reasonably presumed that a decision to use the policy at the M-50 level but not at the section chief level was arbitrary. That the only deviations from the reupgrade policy at the M-50 level were for two men adds credence to the district court's conclusions. Considering all the evidence in the record, we conclude that the district court's finding of discrimination in the company's reupgrade policy was not clearly erroneous.

Western Electric raises two related points concerning the relative treatment of men and women. It argues that because similarly situated male employees were treated as Pitre was, her treatment could not have been discriminatory or retaliatory,[5] and because more women than men were promoted during the relevant period, its promotion policy could not have been discriminatory. However, an

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[5] In regard to the failure to repromote Pitre, Western Electric also argues that the district court's finding that it retaliated against her for filing her suit is clearly erroneous because the company did not have adequate notice of a retaliation claim. Pitre responds in her brief that her first amended complaint (the first document filed after Western Electric began promoting employees after the slowdown) included a claim for retaliation; testimony at trial touched on the retaliation issue; and Western Electric did not raise this argument below and in fact even responded to the retaliation claim in post-trial filings. Western Electric does not rebut these assertions in its reply brief. Because this argument was not presented below, we will not address it here.

employer is not immunized from liability simply because some males received detriments before or contemporaneously with a Title VII plaintiff or because other protected classes received benefits instead of a Title VII plaintiff. *See United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 950 (10th Cir.1979). "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for [all] . . . , without regard to whether members of the applicant's [sex] are already proportionately represented in the work force." *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 579, 98 S.Ct. 2943, 2951, 57 L.Ed.2d 957 (1978). Similarly, that a member of a protected class was hired or promoted in place of a Title VII plaintiff has repeatedly been held insufficient to insulate the employer from liability. *Cockham v. South Central Bell Telephone Co.*, 695 F.2d 143, 145 (5th Cir.1983); *Peters v. Lieuallen*, 693 F.2d 966, 970 (9th Cir.1982); *DeLesstine v. Fort Wayne State Hosp.*, 682 F.2d 130, 132-33 (7th Cir.), *cert. denied*, 459 U.S. 1017, 103 S.Ct. 378, 74 L.Ed.2d 511 (1982); *Lee Way Motor Freight*, 625 F.2d at 950. A statistical showing that a higher percentage of female applicants are hired than male has also been held unavailing. *Catlett*, 828 F.2d at 1266. "[I]rrespective of the form taken by the discriminatory practice, an employer's treatment of other members of the plaintiff's group can be 'of little comfort to the victims of . . . discrimination.' " *Connecticut v. Teal*, 457 U.S. 440, 455, 102 S.Ct. 2525, 2535, 73 L.Ed.2d 130 (1982) (quoting *Teamsters*, 431 U.S. at 342, 97 S.Ct. at 1858). Thus, a showing that some similarly situated males were demoted at the same time as Pitre, or a showing that more women than men were actually promoted, does not

preclude the district court from finding a statutory violation.

Although favorable treatment of members of a protected class tends to undermine a plaintiff's Title VII claim, the district court must weigh this evidence against the relevant evidence tending to show discrimination. Evidence that most of the promotions during the relevant period were given to women does not establish that other promotion decisions were not made on a discriminatory basis, particularly when most of the promotions were in the lower M levels that were comprised predominantly of women. The *Sweeney* court addressed an argument similar to that advanced here as follows:

> "This information [of favorable treatment of women] obviously bears on the question of discrimination but it does not render the district court's contention clearly erroneous. . . . Nor does the promotion of one woman of admittedly outstanding credentials to [a top position] and the denial of such a promotion to two men preclude a finding that another woman was denied the same position because of sex. One familiar aspect of sex discrimination is the practice, whether conscious or unconscious, of subjecting women to higher standards of evaluation than are applied to their male counterparts. The district court could have concluded . . . that [plaintiff] would have been promoted had she been evaluated against the standard that was applied generally to men."

Sweeney v. Board of Trustees of Keene State College, 604 F.2d 106, 114 (1st Cir.), *cert. denied*, 444 U.S. 1045, 100 S.Ct. 733, 62 L.Ed.2d 731 (1979). The district court pointed out that

several of Pitre's performance ratings were modified after their submission by her supervisor without the supervisor's knowledge, and at least one clearly less qualified person was promoted ahead of Pitre.[6] Considering this and other evidence, the evidence of facially nondiscriminatory promotion practices simply cannot render the court's ultimate decision clearly erroneous.

Similarly, the district court's finding that Western Electric demoted Pitre because she was a woman was not clearly erroneous. She presented evidence that her performance was in the middle of the pack of section chiefs. The district court, therefore, could have relied on Western Electric's failure to present evidence of a systematic comparison of all the section chiefs to infer that Pitre was demoted before less qualified males who were never considered for demotion. Even if we assume that Western Electric has proven that the males demoted were similar to Pitre, the company did not show that all of those not demoted were superior to her. We therefore cannot hold the district court's finding clearly erroneous.[7]

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[6] Western Electric's claim that the district court disingenuously used the promotion of a less qualified woman over Pitre as evidence of retaliation is clearly off the mark. As we discussed supra, promoting a member of a protected class does not prove that a nonpromoted member of the class was not discriminated against. The issue in this case was whether a qualified woman was denied a promotion that she would have received had she been a man or had she not filed a discrimination complaint.

[7] Western Electric's other claims essentially urge us to reweigh the evidence. For example, it argues that the district court may have erroneously ignored evidence of Pitre's unsatisfactory performance because the court may have been

IV.

REMEDIES

Both parties disagree with the class remedies imposed by the district court, which included some back pay, and some front pay, and an injunction.[8] Title VII remedies are equitable awards intended to advance the dual statutory goals of eliminating the effects of past discrimination and preventing future discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S.Ct. 2362, 2372, 45 L.Ed.2d 280 (1975). The purpose of the statute is also "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Id.* Typically, although not invariably, this make-whole relief takes the form of back pay awards. *Id.* at 415-16, 95 S.Ct. at 2370-71. The district court may, however, employ whatever remedies are necessary to achieve the public policy interests at issue. *See, e.g., Franks v. Bowman Transp. Co.*, 424 U.S. 747, 762-68, 96 S.Ct. 1251, 1262-63, 47 L.Ed.2d 444 (1976) (awarding retroactive

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focusing on the justification necessary to fire an employee rather than to demote one in troubled times. Certainly, less evidence of poor performance is usually necessary to justify a demotion than a dismissal. The district court, however, stressed a great deal of evidence suggesting that Pitre's performance was actually quite good. It also had to consider the atmosphere of discrimination in which she was forced to perform. Most importantly, it noted that none of Pitre's allegedly long list of inadequacies was ever recorded in her file. *Cf. Griffin v. George B. Buck Consulting Actuaries*, 551 F.Supp. 1385, 1389 (S.D.N.Y. 1982) (no mention made of justification for refusal to hire until long after the fact). The record as a whole more than justifies the district court's liability finding.

[8] The parties stipulated to a remedy for Pitre.

seniority relief); *Albemarle*, 422 U.S. at 415-18, 95 S.Ct. at 2370-72 (back pay); *Fitzgerald*, 624 F.2d at 957 (front pay); *United States v. City of Chicago*, 549 F.2d 415, 436-37 (7th Cir.1977) (mandatory hiring quotas). In general, courts should strive to award "the most complete relief possible." *Albemarle*, 422 U.S. at 421, 95 S.Ct. at 2373; *see Franks*, 424 U.S. at 764 n. 21, 96 S.Ct. at 1264-65 n. 21 (reducing the existing earnings gap caused by past discrimination part of affording complete relief).

In some situations, the court can evaluate each victim of discrimination individually and adopt a remedy that makes the injured person as well off as she would have been absent discrimination. *E.G., Teamsters*, 431 U.S. at 371-72, 97 S.Ct. at 1872-73. Where the discrimination has continued for an extended time and the challenged employment practices throughout the relevant period turned on subjective criteria, however, any attempt to predict where any individual victim would be in the employment process absent discrimination is mere guesswork. In such cases, some courts have concluded that a group remedy can best fulfill the purposes of the statute. *See Catlett*, 828 F.2d at 1267; *Segar*, 738 F.2d at 1289-91; *Love v. The Pullman Co.*, 569 F.2d 1074, 1077 (10th Cir.1978); *Stewart*, 542 F.2d at 452; *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 261-62 (5th Cir.1974).

In this case, both parties agreed that a group remedy was appropriate and that the back pay award should be divided pro rata among the class. *Pitre* II, at 3. The district court concurred:

> "The Supreme Court established the usual procedure for determining class-wide recovery

in *Teamsters v. United States*, 431 U.S. 324, [97 S.Ct. 1843, 52 L.Ed.2d 396] (1976):

> Initially, the court will have to make a substantial number of individual determinations in deciding which of the minority employees were actual victims of the company's discriminatory practices. After the victims have been identified, the court must, as nearly as possible, 'recreate the conditions and relationships that would have been had there been no' unlawful discrimination.

Id., [431 U.S.] at 371-72 [97 S.Ct. at 1872-73] (quoting *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 769 [96 S.Ct. 1251, 1266, 47 L.Ed.2d 444] (1976)). In the case at hand, however, it is virtually impossible to determine which class members would have been promoted had there been no discrimination. There was no posting of promotion opportunities, women were given misinformation regarding job duties and discouraged from seeking promotions, and promotions were made on solely subjective criteria. Hence, the *Teamsters* approach is not practical, and a formula approach to back pay is appropriate."

Id. at 2-3.

A. The District Court's Award

The district court adopted a method of calculating back pay that was similar to the one used by Western Electric's statistical expert. Rather than merely look at the static distribution of men and women at any one time, the court focused on the dynamics of the work force during

the relevant period. It calculated the percentage of women in a given classification and determined for each relevant year whether they received their proportionate share of the promotions given to the next highest level. If the percentage of women promoted was lower than the percentage in the next lower classification, back pay was awarded from that year through the relevant period. The back pay amount was calculated by comparing the salaries of the men promoted to those of the women who were not. This amount was distributed among the women who remained at the lower classification. Back pay for discrimination in demotions was calculated using a similar percentage comparison of women in each job classification.

The district court recognized that this method of calculating back pay ignored the effect of past discrimination on the current position of women in the company. The court attempted to address the problem by ordering front pay. *Pitre* II, at 6-8. Since fifty percent of Western Electric's work force was female, the court concluded that front pay was appropriate for women in any level for which the next highest level consisted of more than fifty percent men. This award would continue, the court held, until women were adequately represented throughout the company. The district court declared that it preferred the front pay remedy rather than a more complete back pay award because the former would provide added incentive for Western Electric to move women into high level positions as rapidly as possible. *Id.* at 8.

Finally, the court issued an injunction barring further discrimination or retaliation against the class and ordering Western Electric to notify all prospective female promotees about the availability of future job opportunities. *Id.*

B. Western Electric's Objection to the Remedy

Western Electric's basic objection to the remedy is that the women receiving the greatest compensation were not actual victims of discrimination and therefore the remedy violates the principles announced in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 579-82 n. 15, 104 S.Ct. 2576, 2589-90 n. 15, 81 L.Ed.2d 483 (1984).[9] *Stotts*, an affirmative action case, contains broad language indicating that section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), permits the grant of a remedy only to actual victims of illegal discrimination. This dicta in *Stotts* has since been limited in *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986). A majority of the Court agreed that, in the context of affirmative action, section 706(g) does not deprive courts of all power to fashion a Title VII remedy which benefits nonvictims of the discrimination. *See id.* 106 S.Ct. at 3049-50 (Brennan, J., joined by Marshall, J., Blackmun, J., and Stevens, J.); *id.* at 3054 (Powell, J., concurring); *id.* at 3062 (White, J., dissenting). Justice Brennan noted in particular that many circuit courts subsequent to *Stotts* have declined to read the decision

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[9] We have reviewed Western Electric's other attacks on the remedy and find them unpersuasive.

broadly. *Id.* at 3050 n. 47 (citing cases); *cf. Catlett*, 828 F.2d at 1267-68.

We need not decide how far a district court may go in ordering a group remedy to be shared by the class, instead of holding hearings to determine the individual victims of the employer's discrimination, because Western Electric agreed to the procedure utilized below. *Cf. Thompson v. Sawyer*, 678 F.2d at 286-87. In these circumstances, we will instead apply the logic of the group remedy cases. In so doing, we will examine the particular remedy imposed to ensure that it does not frustrate the purposes of the statute. *Albemarle*, 422 U.S. at 415-16, 421-22, 95 S.Ct. at 2373-74.

We recognize that a Title VII remedy will often fail to completely "make whole" each victim of actual discrimination. *Cf. Franks*, 424 U.S. at 776 (truly complete relief would involve downgrading those who would not have their positions but for the discrimination). In the case of a group remedy, moreover, precise proof of the discrimination giving rise to each award of back pay or other remedy will not exist. *See e.g., Segar*, 738 F.2d at 1290-91. We must scrutinize the group remedy carefully to ensure that the purposes of the statute are fulfilled, *id.* at 1293, and extend deference to the district court's "keener appreciation of those facts and circumstances peculiar to particular cases," *Albemarle*, 422 U.S. at 421-22, 95 S.Ct. at 2373-74. In other words, although the district court's discretion is bounded by the dictates of considered judgment, *id.* at 415-16, 95 S.Ct. at 2370-71, we do not review Title VII remedy judgments de novo, *see, e.g., Salone v. United States*, 645 F.2d 875, 878 (10th Cir.), *cert. denied*, 454 U.S. 894, 102 S.Ct. 390, 70 L.Ed.2d 208 (1981); *EEOC v.*

Safeway Stores, Inc., 634 F.2d 1273, 1282 (10th Cir.1980, *cert. denied*, 451 U.S. 986, 101 S.Ct. 2321, 68 L.Ed.2d 844 (1981); *Lee Way Motor Freight*, 625 F.2d at 932.

Western Electric argues that the court's formula for determining back pay and front pay should be reversed because the record does not reflect discrimination sufficient to justify the award. However, the district court found that the company had violated Title VII. The court was then required by statute to devise a remedy that would best serve the public policy interests at issue. Western Electric's dissection of parts of the proposed remedy and its argument that little or no proof of discrimination supported a particular back pay award is of no moment, given its concession below that a pro rata group remedy should be fashioned. The company had its chance at the liability stage to argue that discrimination did not occur. We have found sufficient evidence of discrimination to support the district court's liability determination. Thus, the only justification for overturning the remedy on appeal is that it fails to serve the statute's purposes.

Even if we interpret Western Electric's argument as an attack on the remedy's effectiveness instead of as just another argument against liability, we find it no more persuasive. Western Electric does not offer any alternative method of formulating a group remedy that would serve the statutory purposes as well or better than that ordered by the district court. Courts endorsing a group remedy have said that Title VII "should not be read as requiring effective denial of backpay to the large numbers of [employees] whom [the employer's] discrimination has injured in order to account for the risk that a small

number of undeserving individuals might" be overcompensated. *Segar*, 738 F.2d at 1291. In group remedy cases, "[i]f effective relief for the victims of discrimination necessarily entails the risk that a few nonvictims might also benefit from the relief, then the employer, as a proven discriminator, must bear that risk." *Id.* (citing *Stewart*, 542 F.2d at 452-53). Since we have long preferred to leave the issue of fashioning the remedy to the district court, *Fitzgerald*, 624 F.2d at 956, the lack of a better alternative weighs strongly in favor of its method.

In short, we conclude that the trial court's decision to grant back pay, front pay, and an injunction was a proper exercise of its equitable discretion.

C. The Class' Objections to the Remedy

The class' arguments against the district court's remedy focus on its patent unfairness in awarding the majority of the back and front pay awards to a relatively small portion of the class. The women receiving the greatest rewards, according to plaintiff, were typically those who suffered the least because of the discrimination and who offered the least assistance in proving the class case. The crux of plaintiff's argument is expressed in the following passage: "The Court conceded the impossibility of identifying with any precision those women who would have been elevated to the M-40 level, yet it chose to reimburse only those who had, to the exclusion – and detriment – of the other candidates." Brief of Plaintiff/Appellee at 62. Plaintiff also argues that the district court's attempt to use front pay as a hedge against the inadequate back pay award fails because it too would go only to women

already in the higher job levels. In addition, the court restricted the availability of front pay to those women who remain in Western Electric's employ.

Specifically, plaintiff describes the net effect of the district court's remedial order as follows:

> "1. Nineteen class members who were laid off after December 11, 1974, received no back pay whatever for those terminations.
>
> "2. Back pay for demoted class members began with the month of demotion and ended when they were returned to former levels. No compensation was ordered for the pay differentials existing from 1973 on by reason of the company's past discriminatory promotion policy. The remedy gives its imprimatur to discriminatory effects as they existed during the actionable period.
>
> "3. Back pay for promotions denied to women from 1976 was ordered only for some class members who were M-20's in 1976 and those class members who were M-40's before 1981. No other women received any compensation for discriminatory promotion practices. One M-20 was totally excluded from this recovery (J. Deutman).
>
> "4. In lieu of back pay from 1973 to 1980 to all class members suffering pay differentials stemming from historic promotion denials and the effects of the downgrading, the Court ordered front pay to some of those M-40's who received back pay in paragraph 3 above. No other class members received front pay.
>
> "5. Thirteen females received virtually all the money awarded. Of this number, only three

> were willing, despite their fear of retaliation, to participate in the preparation of the class aspects of the case and to testify at trial. The vast majority of the witnesses who assisted and testified received either nothing or only a paltry sum. The Remedy Order rewarded those whose fear of retaliation kept them from coming forward.
>
> "The inequity in the Court's remedy is apparent: 24 class members received no compensation at all (including 16 who were laid off, five who were not downgraded at all, and three who resigned during the actionable period); 24 women shared $40,328.00; and the remaining 13 females received an aggregate sum of $468,224.00."

Brief of Plaintiff/Appellee at 58-59.

In reviewing the district court's remedy, we adopt the three guideposts that other circuits have followed in similar cases involving group remedies. These are as follows:

> "(1) unrealistic exactitude is not required; (2) ambiguities in what an employee or group of employees would have earned but for discrimination should be resolved against the discriminating employer; (3) the district court, far closer to the facts of the case than we can ever be, must be granted wide discretion in resolving ambiguities."

Stewart, 542 F.2d at 452; *Pettway*, 494 F.2d at 260-61. Where a group has suffered discrimination through subjective management decisions, "a precise calculation of the pecuniary effects of discrimination" is impossible. *Stewart*, 542 F.2d at 452. Thus, "[t]he method of calculating a class-wide backpay award must not be rigid." *Pettway*, 494 F.2d

at 260. "The key is to avoid both granting a windfall to the class at the employer's expense and the unfair exclusion of claimants by defining the class or the determinants of the amount too narrowly." *Id.*, 494 F.2d at 262 n. 152.

Although a district court's remedy should be disturbed only when it frustrates the statutory purposes, we must reverse in this case. *See Albemarle*, 422 U.S. at 421-22, 95 S.Ct. at 2373-74. The district court properly attempted to balance the employer's and the employees' interests, but it erred by failing sufficiently to consider the effects of past discrimination.

First, we believe the court unintentionally disregarded earnings lost due to the lingering effects of past discrimination. "[B]ecause promotions at [Western Electric] are cumulative, the effects of discrimination in promotions are also cumulative. Denial of promotion to one grade affects the [employee's] eligibility for later promotions to higher grades." *Segar*, 738 F.2d at 1291; *accord Thompson v. Sawyer*, 678 F.2d 257, 290 (D.C.Cir.1982).

> "When discrimination continues over time, as it did at GPO, the harms it causes are compounded. An employee denied a raise in one year will fall further behind if raises in subsequent years are a function of prior salaries. Likewise, an employee denied a promotion in a given year may be frozen out of additional promotional opportunities, unless the missed rung on the promotion ladder is somehow replaced. When the effects of illegal discrimination are compounded, basing the plaintiffs' compensation only on events within the two-year accrual period seriously shortchanges their recovery for

> the harm actually suffered during the accrual period itself."

Id. at 290. Although the district court specifically recognized this proposition, *Pitre* II, at 7, it concluded:

> "In computing back pay, the court could have considered events occuring beyond the limitations period. We could have gone back to 1965 (when Title VII became effective) and determined the number of promotions discriminatorily denied women between 1965 and 1974 (the starting date for back pay calculations). *See Thompson v. Boyle*, 499 F.Supp. 1147 (D.D.C.1980), *modified sub nom. Thompson v. Sawyer*, 678 F.2d 257 (D.C.Cir.1982) (*citing Salone v. United States*, 645 F.2d 875 (10th Cir.), *cert. denied*, 454 U.S. 894 [102 S.Ct. 390, 70 L.Ed.2d 208] (1981)). This method would have resulted in the number of women that should have been at each level by 1974 in the absence of discrimination. *Because a greater number of women would have been at the higher levels, a greater back pay recovery for the class would result for the years 1974 through 1981.* . . .
>
> " . . .
>
> "In recognition of the inequity discussed in *Thompson v. Sawyer*, and in order to fully compensate the class, we have decided that front pay is appropriate in this case. . . . *We have chosen to allow front pay in this manner rather than calculating back pay by taking into account events occurring back to 1965.* This method better serves the purposes of Title VII. Front pay in this case will have the effect of moving women into the higher levels rather than merely compensating them for discrimination in the past. Back pay for

> only a few of those years of discrimination, without restoring women to their rightful places, would not fully compensate the plaintiff class."

Id. at 6-8 (emphasis added.)

It is apparent from the quoted statements that the district court believed front pay would in part replace back pay. However, front pay is intended to compensate victims of discrimination for the continuing *future* effects of discrimination until the victim can be made whole. Thus, in *Lee Way Motor Freight*, 625 F.2d at 932, we stated:

> " '[B]ack pay in Title VII cases may be supplemented, in the *district court's discretion*, by an award equal to the estimated present value of lost earnings that are reasonably likely to occur between the date of judgment and the time when the employee can assume his new position.' "

Id. (quoting *White v. Carolina Paperboard Corp.*, 564 F.2d 1073, 1091 (4th Cir. 1977) and adding emphasis). Front pay is a substitute for immediate promotion which cannot occur because there are no positions currently available. *Cf. Bruno v. Western Elec. Co.*, 829 F.2d 957, 966 (10th Cir.1987) (front pay is merely a substitute for reinstatement when reinstatement is not feasible). Front pay is thus a supplement to back pay, not a substitute for it, particularly where as here the front pay is granted to only a limited number of employees.[10]

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[10] The distribution of front pay was limited to those women who remain employed by Western Electric. This restriction makes front pay a clearly inadequate substitute for back pay. *See*

Second, the district court appears to have insufficiently considered the effects of past discrimination in determining how to distribute the amount of back pay it deemed appropriate. Thus the court limited the distribution of back pay to the women in the job classification who were considered in the determination of the amount. *See supra* at 1275. Even if the court had valid reasons for considering only the women in the M-40 grade as eligible for promotion to the M-50 grade,[11] for example, in a group remedy context it should not have limited the pro-rata distribution of the back pay to those women already in the M-40 classification because, but for the discrimination, other women would have progressed to the M-40 level.

It is not our province to attempt to devise a remedy at this level. Rather, we remand to allow the district court to resolve these problems. On remand, the court is free to consider any method of determining the appropriate amount of back and front pay to which the class is

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Pettway, 494 F.2d at 253 ("the raison d'etre of a back pay award is to compensate victims of discrimination for economic loss, not to punish the discriminating employer or insure future compliance").

[11] The class argues that the several examples in the record of individuals jumping job classifications makes clearly erroneous the district court's decision to calculate the amount of back pay due to the class on a step-by-step basis. The fact that jumping classifications was not uncommon, however, does not render clearly erroneous the district court's decision to focus on the more common progression in fashioning a remedy. On remand, the district court is free to reconsider its decision to assume that promotions would proceed one grade at a time; however, we do not hold that it is required to do so.

entitled. Some courts have ordered parties to negotiate a suitable approach to determining back pay. *See Pettway*, 494 F.2d at 262 n. 152 (citing cases). Other courts have expressed a preference for group comparisons. *See Love*, 569 F.2d at 1077; *Stewart*, 542 F.2d at 453; *Pettway*, 494 F.2d at 262-63. For example, the salary of representative groups of women could be compared with groups of men of similar education and experience or length of service. The differences could be distributed pro rata among the members of the particular groups. By not using the women's current position in the company, the effects of past discrimination may be more fully incorporated into the formula. In principle, the district court's method of calculating the promotions that should have gone to women with those that actually did go to women could again be used. The court must, however, either attempt to account for the effect of past discrimination on the position of women at the beginning of the relevant period or explain why such consideration is unnecessary. *Cf. Albemarle*, 422 U.S. at 417, 95 S.Ct. at 2371.[12]

Whatever method is ultimately chosen to determine the amount of back pay due to the class, the district court might well consider the plaintiff class' expressed desire as to how the award should be distributed among the

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[12] The only evidence in the record that might suggest limiting the back pay award is the apparent attempts by Western Electric to improve its promotion practices late in the relevant period. While this factor is not irrelevant, the court should not accord it excessive weight. Good faith, under any circumstances, "simply opens the door to equity"; it does not require that the employer benefit at the expense of injured victims of discrimination. *Albemarle*, 422 U.S. at 422-23, 95 S.Ct. at 2373-74.

class members. In Title VII suits, the class victims are often in the best position to evaluate the actual damage caused to particular individuals by discrimination in employment practices. We stress, however, that the ultimate fashioning of relief is left to the district court's good judgment, guided by the factors set out in *Albemarle*, 422 U.S. at 416-21, 95 S.Ct. at 2370-73.[13]

V.

The decision of the district court is affirmed as to liability and reversed as to remedy. The case is remanded for the formulation of a new remedy consistent with this opinion.

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[13] Western Electric contends on appeal that the injunctive relief was improper because there was no evidence of discrimination. We have rejected this contention. The class argues that the injunctive relief was inadequate. In view of our conclusion that the remedies must be reformulated, the district court may on remand fashion whatever injunctive relief in deems necessary to augment the other remedies.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JANICE D. PITRE, individually and on behalf of a class, Plaintiff, v. WESTERN ELECTRIC COMPANY, INC., Defendant.	)	CIVIL ACTION No. 76-218-C2

MEMORANDUM AND ORDER

(Filed Aug. 9, 1983)

I. INTRODUCTION.

This is an employment discrimination case brought under 42 U.S.C. § 2000e, *et seq.* (Title VII). Plaintiff, individually and on behalf of a class composed of female employees in the salary-graded and section chief levels at defendant's Merriam and Lenexa, Kansas facilities, alleges that defendant discriminated against females in matters of assignment, promotion and downgrading. Plaintiff individually alleges that defendant retaliated against her for instituting these Title VII proceedings, and also violated the Equal Pay provisions under the Fair Labor Standards Act, 29 U.S.C. § 206(d). Trial to the court commenced on May 20, 1982, and lasted approximately two weeks. After considering all the evidence, arguments of counsel, memoranda, and the proposed findings of fact and conclusions of law submitted by the parties, the court enters the following decision with respect to liability. The

appropriate remedy for these violations will be considered in subsequent proceedings.

II. PRELIMINARY ISSUES.

A. Jurisdiction.

Jurisdiction and venue of this Title VII action properly lie in this court. Plaintiff has exhausted all procedural prerequisites to bringing this action.

B. Parties.

Western Electric is a New York corporation which manufactures, services and installs telephones and related communication equipment throughout the United States. The facilities involved in this case are located in Merriam and Lenexa, Kansas, and are considered part of defendant's southwestern region. Defendant is an "employer" within the meaning of the statutory definition contained in Title VII, 42 U.S.C. § 2000e(b).

The individual plaintiff[1] and class members are "employees" protected by Title VII as defined in 42 U.S.C. § 2000e(f). The class action was certified by order dated January 8, 1979, and defined the members of the class as "all female employees of Western Electric in positions ranging from grades M-10 through M-50 and in the position of section chief, who have been discriminated against in assignment, promotion, or downgrading, and who

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[1] Plaintiff was the victim of an unrelated homicide after the completion of the trial, but prior to this opinion.

have been employed at defendant's facilities in Merriam and Lenexa, Kansas, after December 11, 1974."

C. Actionable Period.

The time period for which defendant may be held liable for Title VII violations to the class extends back to December 11, 1974, 180 days prior to the filing of plaintiff's EEOC charge of discrimination, since plaintiff specifically alleged and sought to prove acts of discrimination from that date. Plaintiff presented a considerable volume of evidence of discriminatory acts by defendant against women prior to 1974, which plaintiff represented to the court as background evidence relevant to the intent and motive of defendant in its treatment of women after December 11, 1974. *United Air Lines v. Evans*, 431 U.S. 553 (1977). Plaintiff's individual claim of discrimination similarly focuses on this time frame, which includes her downgrading and the subsequent alleged retaliatory action against her.

III. BACKGROUND.

At the outset it should be explained that there are two facilities involved in this action. The Merriam facility is primarily a service center which performs assembly, repair, shipping, receiving, docking and related functions. In addition to service center employees, a number of individuals performing installation duties are assigned to this facility. The Lenexa facility is primarily an installation center which serves as a headquarters and clearinghouse for installation employees in the field, although there are a few service center employees located there.

Until the late 1960's, the Lenexa facility had its own management structure and reported directly to the regional headquarters in St. Louis. Management was then reorganized and the installation facility was brought under the supervision of the plant manager for the Merriam facility. Although there have been subsequent changes in the management structure, installation employees were under the supervision of the service center plant manager immediately prior to and after the downgrading in 1975, and salary-grade level employees were transferred freely between installation functions and service center functions.

There are three distinct types of employees at both the Merriam and Lenexa plants. Blue-collar workers are referred to as "hourly employees" and are represented by the Communication Workers of America Union. The second group is composed of white-collar office employees referred to as "salary-graded" or "M-Level" employees. Depending on their duties, salary-graded employees are presently classified in one of five levels ranging from M-10 to M-50. The third group is composed of the supervisory persons referred to as "management." The lowest level of management is a section chief, followed by department chiefs, assistant managers and the plant manager, who reports to regional headquarters in St. Louis.

IV. PLAINTIFF PITRE.

Title VII of the Civil Rights Act of 1964 bans employment discrimination by employers on the basis of race, color, religion, sex or national origin in hiring, compensation, conditions of employment and dismissals. 42 U.S.C.

§ 2000e, *et seq.* Title VII also makes it an unlawful employment practice for an employer, subject to its provisions, to discriminate against an employee "because [s]he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under Title VII." 42 U.S.C. § 2000e-3(a). This section is to be liberally construed. *Rutherford v. American Bank of Commerce*, 565 F.2d 1162 (10th Cir. 1977).

To establish a claim of discrimination based on sex or retaliation for participation in protected Title VII activities, a plaintiff must satisfy the order of proof set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972), and recently refined in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Plaintiff must first establish a *prima facie* case from which discrimination or retaliation may be inferred. If a *prima facie* case is established, the defendant must articulate, using admissible evidence, a legitimate nondiscriminatory reason for taking the action of which plaintiff complains. If such reason is offered, in order to prevail, plaintiff must demonstrate that defendant's articulated reason is a mere pretext for unlawful discrimination. Throughout these stages the overall burden of persuasion remains with the plaintiff. *Texas Department of Community Affairs, supra.*

Plaintiff had three and one-half years secretarial experience prior to accepting employment with Western Electric in 1960 as a secretary to an installation manager at the Lenexa facility. Her initial job was classified as a D-4 on an eight-level salary-graded employee plan, later changed to a five-level plan. She proved to be a competent, productive employee and was promoted to level D-5 in 1962.

From 1962 to 1970, plaintiff worked as a secretary for the assistant manager of installation, Mr. Evans. During this time plaintiff helped train men who rotated into a section chief job at the installation center and she, in fact, occasionally performed those duties in their absence for up to a month. She did not receive temporary upgrades in pay for those duties despite company policy which provided for such increases.

Mr. Evans was very pleased with plaintiff's performance and submitted her name for promotion to section chief in the late 1960's. Since there were no females in management in the installation functions of Western Electric anywhere in the United States at that time, Mr. Evans' supervisor rejected the promotion because of the precedent it would establish. Plaintiff was promoted to the D-6 level in 1970, and gained more experience through lateral job movements in 1971.

Pitre was again recommended by Mr. Evans for a section chief position, and this time the recommendation was acted on favorably. Plaintiff was promoted to section chief on October 1, 1971, along with Norma Cameron, another female. Plaintiff's pay was below the normal section chief rate because company policy limited increases in salary to fifteen percent.

For the first six months as section chief, plaintiff performed the duties she had previously performed as a secretary when substituting for section chiefs. Plaintiff was then assigned to a satellite warehouse with twelve hourly employees under her.

Plaintiff was not familiar with the functions of the satellite warehouse, and requested instructions from her

supervisor, Gene O'Brien. When asked, Mr. O'Brien simply responded that he expected her to figure out the job. Plaintiff did learn the job and what was expected of her by arriving before work and talking to the other section chiefs and asking questions of her employees. When she attempted to discuss her duties or performance with her department chief, he would merely laugh and make degrading remarks about her appearance. Plaintiff was never shown any evaluations or told how she was rated during this time.

In 1973, plaintiff was transferred to the service center at Merriam. For the first six months, plaintiff supervised approximately twelve salary-graded employees. Again, plaintiff was not given any formal written ratings, nor told what her performance was. After this six-month period, plaintiff was rotated to another section chief position, this time in charge of hourly employees. The specific department she was responsible for involved classifying and dismantling telephones and telephone equipment for Southwestern Bell.

Plaintiff was informed by her new supervisor, Mr. Shirley, that management had known for some time that sooner or later a woman would be put over the hourly employees, and that there would be resentment because there had never been a woman over these hourly employees. This department also had the least desirable physical environment in the building, and troublesome hourly workers were often assigned to it as a subtle means of punishment. (Plaintiff took this particular job in February or March of 1974.)

Since plaintiff was assigned to a new position, she inquired of her supervisor about her new responsibilities. The male section chief leaving the position was not available, so another section chief gave plaintiff a brief introduction to the employees, informed her what their particular jobs were, and that it would be necessary she keep records of production. Plaintiff came in after regular hours to learn from other section chiefs the duties and responsibilities of her job.

Prior to plaintiff's transfer into this department, production and efficiency had been substantially below established goals, and discipline was very lax. After three months under plaintiff's supervision, production and efficiency within the department reached 100%. Plaintiff was told by her supervisor that her performance rating was good, although she was neither shown nor asked to sign her rating.

After approximately three or four months under Mr. Shirley's supervision, the department in which plaintiff worked was reorganized and plaintiff came under the supervision of Mr. Oursler, another department chief. Despite the change in organization, plaintiff performed essentially the same job she had done for Mr. Shirley. The efficiency and production level of plaintiff's department at this time increased to approximately 135%. Plaintiff, again, was never shown her evaluation ratings during this period, although Mr. Oursler did tell her that he had rated her as "good."

Shortly after the reorganization, plaintiff's employees were required to dismantle a new telephone system. Thereupon, plaintiff asked for a time study to determine

the rate at which the sets should be dismantled. The time study indicated that approximately 700 sets could be dismantled in a given length of time. The union felt that a more appropriate number was 600 sets, and plaintiff eventually reached a compromise in which a goal of 625 sets was established. Plaintiff took a firm stance and told her employees that if they failed to meet production goals she would begin instituting disciplinary measures. The union complained to Mr. Oursler about plaintiff's attitude, and he indicated that he would not permit disciplinary action if the employees failed to reach assigned goals.

While plaintiff was on vacation prior to the 1975 downgradings, several of her employees were caught punching time cards for their co-workers. Although a male section chief was supervising these employees at the time and was responsible for their actions, he received no discipline or criticism for failure to supervise the employees. Upon returning from her vacation, plaintiff was informed by management of the infraction and instructed to take disciplinary action. After ascertaining that employees from other departments regularly violated the time clock policies and were neither disciplined nor investigated, plaintiff discussed the incident with the assistant manager and decided not to formally discipline her employees because she was not present when the infraction occurred.

Plaintiff had difficulty with several male supervisors working near her department. Jake Shoap, a supervisor in the returned goods section, varied the flow of products to plaintiff's employees on the assembly line. If she had only a few employees available, he would flood the line

with equipment, and if she had a full complement, he would send only a few items at a time down the line. Mr. Shoap openly talked about these antics, and management failed to do anything about the situation. J. Depriest, a section chief in warehousing, often stacked pallets of equipment in the work station paths for plaintiff's employees, which hindered their performance. Although management did eventually correct the situation, it was not until the union filed a grievance.

From late 1973 through 1975, the volume of business for the Merriam and Lenexa facilities dropped dramatically because of a transfer of certain functions to the regional headquarters in St. Louis, and a weakening of the national economy in general. Western Electric determined that it would be necessary to reorganize management and trim the ranks of the salary-graded employees through layoffs, downgradings and lateral transfers.

A decision was made by upper-level management to reduce the number of section chiefs. The department chiefs (those supervisors immediately above the section chiefs) were the management employees who initially determined which section chiefs should be downgraded. In performing this task, the department chiefs met on very short notice and did not request any employee records from personnel.

The corporate instructions for downgrading provided that employees with the lowest-rated abilities would be affected first. Although three section chiefs, Stokes, Tooley and DeFries, had performance ratings of "limited," the department chiefs chose Stokes, Depriest and plaintiff for downgrading. When the plant manager

was informed that plaintiff was one of the section chiefs to be downgraded, he cautioned the department chiefs that this decision would have repercussions and to be certain the company could justify the selection of plaintiff. After plaintiff's downgrading, Mr. Tooley was downgraded two weeks later, and Mr. DeFries retired six months thereafter.

No records of the downgrading meeting were kept. It is clear, however, that plaintiff was suggested for downgrading by department chief Rupp, a manager who had never supervised or had plaintiff under his authority. Plaintiff's supervisor, Mr. Oursler, did not initially feel that plaintiff should be downgraded, but after considerable persuasion by Mr. Rupp, he finally agreed that she should be one of the section chiefs downgraded. There was no comparison of plaintiff's performance with the pool of male section chiefs with similar ratings and work experience.

Upon being notified that she was to be downgraded to the M-50 level effective May 15, 1975, plaintiff expressed dismay and spoke to the plant manager, Mr. Yerke. Mr. Yerke told plaintiff that she was downgraded only because of the needs of the business, and that when section chief positions became available, she would be brought back into management.

Plaintiff filed a charge of sex discrimination with the Equal Employment Opportunity Commission on June 9, 1975.

Plaintiff was downgraded to the M-50 level and was a material adjuster for approximately a year and one-half. She was then transferred to the installation function as a

test set coordinator. The department chief over plaintiff until 1979 was Mr. Bob Lanyon, and during this time she was never notified of any openings for section chiefs at Merriam or Lenexa, although several existed. Additionally, Western Electric had requisitions for section chiefs throughout the nation, and plaintiff was never informed of these.

Plaintiff has, since the time of downgrading, remained qualified at all times for promotion to section chief. She has not been placed on the management potential inventory list, a requirement for being considered a candidate for a section chief opening, even though her performance ratings have been rated "good" and at times "outstanding," and her promotability has been assessed as "ready now."

Plaintiff has established a *prima facie* case, concerning her downgrading, sufficient to give rise to an inference of unlawful sex discrimination. Historically, Western Electric has had a discriminatory attitude toward women, and at the time of the downgrading, only two out of forty-two section chiefs for the service center were female. The department chiefs who determined which section chiefs would be downgraded, were men who had worked for Western Electric when discrimination was openly practiced against women. No objective standards were considered in determining which section chiefs should be downgraded, and although there were two male section chiefs with lower performance ratings than plaintiff, they were not downgraded. Given these circumstances, the court is of the opinion that plaintiff has established a *prima face* [sic] case.

Defendant has responded to plaintiff's *prima facie* case by articulating reasons for the adverse action taken towards plaintiff. It is undisputed that the needs of the business and the generally weakened national economy required Western Electric to downgrade some management employees at the Western Electric facilities at Merriam and Lenexa from 1974 through 1976. Defendant contends that plaintiff was downgraded prior to two men with lower performance ratings because one, Mr. Tooley, was working on a special project and was in fact downgraded two weeks later, and that the other, Mr. DeFries, was permitted to retire at the end of 1975 instead of being downgraded. Additionally, defendant has presented evidence concerning plaintiff's performance while she was a section chief, and that her performance rating at the time of the downgrading was only "marginally good." The corporate guidelines setting forth the policy for downgrading decisions indicated that management employees who were limited or marginally "good" should be considered for downgrading first, and that defendant followed this policy.

After review of all of the evidence, the court finds that the articulated reasons set forth by defendant were merely a pretext for the discriminatory treatment of plaintiff. Although Tooley was in fact downgraded within two weeks after plaintiff's downgrading, there is no credible explanation of why plaintiff was downgraded before him. Allegedly, Mr. Tooley was not downgraded at the time because he was working on a special project which would benefit from his technical skills. In fact, he was transferred to the warehouse to replace Depriest, another section chief who had been downgraded. In the case of

Mr. DeFries, defendant's suggestion that he was not downgraded because of his impending retirement would not be so unusual except that no department chiefs spoke to him about retiring instead of being downgraded prior to the meeting. In a letter to the EEOC on September 12, 1975, Mr. Yerke, the plant manager, wrote that the reason DeFries was not downgraded was because of his expertise in electronics, not his impending retirement.

Defendant's suggestion that plaintiff was only a "marginal" performer is also merely a pretext for discrimination. Plaintiff was placed in a difficult work environment where there was obvious resentment from male hourly employees and supervisors. Despite these initial hurdles, plaintiff was able to meet, and then surpass her department's production goals. Defendant attempted to enumerate a number of specific instances when plaintiff made errors in management judgment, but these examples were trivial at best, were to be expected under the circumstances, and were often precipitated by management's own action or inaction. Despite the alleged magnitude of these errors, they are not even mentioned in plaintiff's personnel file.

The irony of the department chief's criticism of plaintiff for not fully investigating incidents before forming a judgment, is that that was precisely how they treated plaintiff. Countless examples were presented at trial where the department chiefs did not ask plaintiff for her version of an incident or management decision. The past president of the hourly workers' union readily acknowledged at trial that the union actively sought to exploit plaintiff for union gains because they knew that management wasn't supporting its first female shop section chief.

There was considerable testimony about plaintiff's performance rating of "marginally good" at the time of the downgrading. The court is highly suspicious that this rating may have been manufactured after the decision was made to downgrade plaintiff in an attempt to justify the department chiefs' decision. Mr. Oursler, plaintiff's supervisor, did not suggest plaintiff's name for downgrading, nor was he initially in favor of her being downgraded. It was only after considerable persuasion by Mr. Rupp, another department chief, that Oursler agreed plaintiff should be one of the downgraded section chiefs. Had Pitre been rated as "marginally good" at the time of the downgrade meeting, Oursler himself would have been the logical individual to raise plaintiff's name for consideration in accord with the corporate guidelines. In addition to this inconsistency, the appraisal itself indicates that plaintiff was rated "limited" in only two of five categories. These two categories were essentially the same and involved work being done for Southwestern Bell. Mr. Higbee, an employee for Southwestern Bell who worked with plaintiff, indicated that plaintiff was personable, the first person to ever attempt to get work out of her employees, and performed somewhere in the middle of all section chiefs. None of plaintiff's immediate supervisors had ever indicated to her that her performance was other than "good," and even Mr. Yerke testified at trial that she was performing satisfactorily or "good."

In addition to these specific findings, the court has given weight to the testimony concerning the general discriminatory attitude of management employees at Western Electric toward women. In light of this general attitude and the circumstances surrounding plaintiff's

downgrading, the court finds that plaintiff was discriminated against on the basis of her sex.

In order for plaintiff to recover on her claim of retaliation, she must first establish a *prima facie* case by showing that: (1) she engaged in protected opposition to Title VII discrimination or participated in Title VII proceedings; (2) she was disadvantaged by an action of her employer subsequent to or contemporaneous with such opposition or participation; and (3) there was a causal connection between the protected activity and the adverse employment action. *Burrus v. United Telephone Company of Kansas, Inc.*, 683 F.2d 339 (10th Cir. 1982). Here these [sic] is no dispute that plaintiff filed an EEOC charge of sex discrimination on June 9, 1975, and instituted the present lawsuit on November 1, 1976. Although she was qualified to perform section chief duties, she was never upgraded, even temporarily. A retaliatory motive may be inferred from the fact that even though plaintiff was qualified, and twelve section chief positions became available after her downgrading, she was not repromoted. Prior to the filing of the EEOC charge and lawsuit, Mr. Yerke, the plant manager, discussed her downgrading with her and indicated that he had no qualms about her performance and would consider her for a section chief position when openings again arose. Since the filing of this lawsuit, the same department chief instrumental in plaintiff's downgrading, Mr. Rupp, has consistently opposed plaintiff's promotion to section chief.

Defendant's alleged nondiscriminatory reason for not repromoting plaintiff has been difficult to discern. The primary reason was presented through Mr. Rupp, who

indicated that "she had had her chance" and that he just didn't think she was qualified. Defendant's post-trial brief also argues that the male section chiefs downgraded with plaintiff have not been repromoted to section chief positions, and that such similar treatment of males negates plaintiff's claim.

The comparison of plaintiff with the downgraded male section chiefs does not resolve this controversy. These downgraded males do not have comparable backgrounds to plaintiff's, since several were old enough to retire and at least one was further downgraded. There also were several subsequent performance ratings of plaintiff which had been modified after their submission by plaintiff's supervisor without her supervisor's knowledge. Furthermore, Mr. Rupp continually opposed plaintiff's promotion after the downgrading, even though he had no contact with plaintiff during the previous two years.

Finally, the court has been presented with at least one specific example of a less-qualified person being promoted to section chief over plaintiff. Although plaintiff was an M-50, Mr. Rupp's secretary, Lois Campbell, an M-20, was promoted to a section chief position at the suggestion of Rupp. Despite evidence that plaintiff was considerably more experienced and qualified for the position, Lois Campbell was taken out of her normal job progression and placed in a section chief position. Given the circumstances surrounding plaintiff's ratings since the downgrading and the other promotions to section chief positions, the court concludes that defendant has retaliated against plaintiff for her protected Title VII activities.

Although plaintiff's original complaint alleged violations of the Equal Pay provisions of the Fair Labor Standards Act, 42 U.S.C. §206(d), she has presented no suggestions to support findings in support thereof. Moreover, the pay differential plaintiff received while an M-50 will be remedied by our findings and conclusions with respect to her downgrading.

V. CLASS ALLEGATIONS CONCERNING DOWNGRADINGS, PROMOTIONS AND ASSIGNMENTS.

The *McDonnell-Douglas* and *Texas Department of Community Affairs* standards of proof are also applicable to class allegations of discrimination. Disparate treatment[2] occurs where "the employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin." *International Brotherhood of Teamsters v. United States*, 431 U.S. at 335, n.15. To establish a class allegation of disparate treatment, proof of discriminatory motive is required and plaintiff must "prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts. [She has] to establish by a preponderance of the evidence that racial [sex] discrimination was the [defendant's] standard operating procedure – the regular rather than the unusual

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[2] Although plaintiff's post-trial brief proposes a finding of liability under both disparate treatment and disparate impact theories, the parties, at the time of trial, presented the case only under a disparate treatment theory. In light of our findings with respect to disparate treatment, it is unnecessary to address the other theory.

practice." *Pouncy v. Prudential Insurance Company of America*, 668 F.2d 795, 802 (5th Cir. 1982), citing *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 at 336 (1977).

Prior to the passage of Title VII in 1964, Western Electric openly discriminated against women in terms of employment and advancement. Women were not allowed to work in certain jobs, and advancement into the upper levels of the company was almost nonexistent. Management was aware that the mandates of Title VII would require them to change their treatment of women, but improvements were not implemented until the late 1960's and early 1970's.

The effect of this historical practice of discrimination is illustrated by the levels at which women were employed. Prior to October 1, 1973, salary-graded employees were under an eight-level plan, which consisted of ranks D-1 through D-8. There were no women in D-8 positions, and only a few women at the D-7 level. Women were clustered in the D-1 through D-3 level, although secretaries were hired in at the D-4 level and did make some advancement. On October 1, 1973, Western Electric converted from an eight-level salary-graded plan to a five-level plan. Grades D-1 through D-3 were generally reclassified as M-10 levels while D-8's were classified as M-50's. Depending on their particular job, D-7 employees were classified as either M-40 employees or M-50 employees. The D-4 through D-6 level employees were likewise converted into M-20 and M-30 employees.

Although there were some advancements by women in the salary-graded levels, they came about very slowly

in the early seventies. Promotion of an M-level employee to a higher level was dependent upon the recommendation of the section chief, and prior to 1971, there were no female section chiefs. The majority of section chiefs and department chiefs worked their way up from the hourly or salary-graded universe, and were employed at Western Electric prior to the passage of the Civil Rights Act in 1964, when discrimination against women was the rule rather than the exception.

The only criteria for section chiefs in making selections for promotion to higher M-level positions were subjective. Salary-graded employees were, however, given regular reviews for purposes of job evaluation, salary and promotion potential. Their performance was rated "outstanding," "good" or "limited," and their promotability was noted as "ready now," "ready later" or "not promotable." There was no formal appeal process with regard to ratings and the general attitude of management was that employees were not to bypass their section chiefs with complaints.

The net effect of the past discriminatory practices and the more recent fact that promotion decisions were being made by male section chiefs, resulted in more women remaining in the lower levels of the salary-graded employee plan. Specifically, distributions of males and females in the salary-graded universe and the management level at Merriam on December 31, 1974, were as follows:

	Males		Females	
	No.	%	No.	%
M-10	2	11	17	89
M-20	4	31	9	69
M-30	4	17	19	83
M-40	16	57	12	43
M-50	24	92	2	8
Section Chief	39	95	2	5
Department Chief	10	100	0	0
Assistant Manager	2	100	0	0
Manager	1	100	0	0

Male supervisory employees generally had a discriminatory attitude toward women prior to, during, and after the downgrading of the salary-graded employees at the Merriam and Lenexa facilities.

During 1973 and 1974, when Kenda Price was working an office position in the warehouse, she was harassed by male employees because she was a woman. Among other things, obscenities were written about her on the bathroom walls, her keys were stolen, her coat was hung from the ceiling, and a dead rat was placed in her desk. Her supervisors acknowledged the problem, but did not take any corrective action. Additionally, in 1973, a male section chief told her that a man was promoted over a woman because "he had a family to support."

Doyle Evans, a retired department chief for Western Electric, was the original supervisor who recommended that plaintiff and Norma Cameron be promoted to the supervisory level. During his tenure with Western Electric, he noted that there was a comradery [sic] between male employees with long service records, and that a "good old boy" system existed in which men were given

preference over women in areas of promotion and job assignment. According to Mr. Evans, there had existed for a long time a discriminatory attitude among supervisory employees that these were men's jobs and women were not capable of performing them. He was of the opinion that even though high level management established satisfactory policies for eliminating discriminatory practices against women within Western Electric, many of the policies, as they trickled down to the lower levels of management, were not carried out.

Throughout the 70's, Mr. DeFazio, a section chief, openly expressed preferences for men in certain jobs with quality control. Mr. Knip, a former assistant manager, acknowledged at trial that he believed there were certain technical jobs that women, even with proper training, could not handle. Assistant manager Doug Jacobs was aware that department chiefs Rupp and Ponti had "old-fashioned" notions about women in the work place. Mr. Rupp, on at least one occasion, said he specifically would not work with a woman who was going to be a member of a committee he was chairing.

The volume of business for the Merriam service center began to decline in 1973. Because of the reduction in work and the fact that the Merriam and Lenexa facilities were top-heavy with white collar employees, layoffs and downgrading became necessary. This began in late 1974 and continued through the early part of 1976.

The procedures for downgrading salary-graded employees were set forth in § 1.07 and § 4.2 of the Corporate Instruction dated March 7, 1975, as follows:

§ 1.07 When lack of work necessitates decreasing the work force, employees to be selected as surplus or those to be layed [sic] off will be determined by the company on the basis of ability, performance, potentiality, term of employment, and the needs of the business. When in the company's judgment two employees are substantially equal with respect to other qualifications, term of employment or time in level, depending on local option shall be controlling.

* * *

§ 4.2 If there are no existing lateral openings for which the designated surplus employees are qualified or can be expected to effectively perform within a reasonable training period, displacement/downgrading procedures shall be initiated as follows:

(a) Those rated outstanding or good will first displace those rated marginal (or local equivalent) at the same level.

(b) A surplus employee will displace the employee at the same level with the least time in level or term of employment depending on local option, provided a minimum three-month differential exists.

(c) The displaced employee in turn will be downgraded to the next lower level. If there are no openings at the next lower level, for which the affected employee is

> qualified or can be expected to efficiently perform within a reasonable training period, the same procedures and provisions as prescribed above will be repeated.

Since the salary-graded employees were not represented by a union, they had no input regarding the procedures and decisions on who would be downgraded and who would be layed [sic] off. Attachment "A", taken from Defendant's Exhibit S, sets forth the actions taken with respect to the M-level employees during the downgrading of 1974 through 1976.

Certain jobs were not subject to downgrading or layoff because of the needs of the business and the particular skills of the person in that position. Secretaries were not considered for downgrading because of the shortage of qualified personnel, and some, but not all, computer personnel were not considered for downgrading.

Mr. Bailey, who became manager of the Merriam and Lenexa facilities in late 1975, noted upon his arrival to the Kansas City area the obvious discrepancy between males and females in the upper levels of the salary-graded employees and management. He inquired into the policies and procedures that were used to determine who was downgraded and layed [sic] off, and concluded that there was no specific policy or, if one existed, it was applied very sporadically.

Mr. Bailey inherited a management staff which had been in place at the Merriam and Lenexa facilities for some time. Because of his newness to the facility, he relied a great deal on these management employees,

although he readily acknowledged that they had discriminatory attitudes towards women and that they didn't think women had the skills and technical knowledge to be in management or the higher M-levels.

There were no promotions within the salary-graded universe from June of 1974 to June of 1976. The general policy with regard to promotions after that time was that the downgraded employees would be upgraded in the order in which they were downgraded. However, several male employees were promoted from the hourly level into high M-level positions, and at least two M-40 males had their jobs reclassified to M-50. Duane Gates, who was given protected treatment during the downgradings, was promoted from an M-10 to an M-20 service center job ahead of several women who had been downgraded from the M-20 to M-10 level. A number of women testified that when they were offered a promotion, they were often told that the job would entail night work or other undesirable characteristics. After they turned down a promotion and a male took the position, it became obvious that those undesirable aspects were not actually a part of the job.

After the downgrading, several women were performing jobs rated as M-30, which were identical to jobs at which males were rated as M-40. When the women complained, they were told they had poor attitudes and were not to complain. Defendant's regional office eventually did send out an evaluation team to evaluate the situation and the team found the difference between the classification of men and women unwarranted. Instead of upgrading the M-30 women to M-40, however, the M-40 men were downgraded to M-30.

Since the passage of the Civil Rights Act, courts have often relied on statistical evidence as proof of a violation. Statistics have considerable probative force because absent explanation, it is ordinarily to be expected that nondiscriminatory employment practices will in time result in a work force more or less representative of the composition of the population in the community from which the employees are hired. *Hazelwood School District v. United States*, 433 U.S. 299 (1977). Thus, the Supreme Court has held that statistical proof may be sufficient to establish a *prima facie* case in employment discrimination cases. *See Hazelwood School District v. United States, supra.* Caution must be exercised in evaluating such evidence, however, since the statistical evidence should be closely related to the issues in the case and its value will depend on the surrounding facts and circumstances. *Beck v. Quick Trip Corporation*, 708 F.2d 532 (10th Cir. 1983).

In the case at hand, both parties have submitted statistics which they allege are supportive of their respective positions. Although some of the statistical evidence is relevant to the court's findings on certain issues, the majority of both parties' statistical evidence is wide of the mark and does not enter into the court's decision. Both parties' statistics are directed primarily toward the issue of promotions into the section chief level, and are based upon a comparison of the percentage of males and females in the relevant "pool" or source of section chiefs to the percentage of womem [sic] of those actually promoted. The definition of the "pool" becomes critical, and neither party has presented a realistic definition. Plaintiff improperly includes many employees in the M-10 level who, as a practical matter, are not qualified to be section

chiefs, and ignores the need in some instances for hourly-level experience. Defendant's "pool," on the other hand, ignores the evidence that hourly-level workers are normally not promotable to the section chief level until they have gained experience in the salary-graded universe. Because of these flaws, the court will make reference to the statistics only where they were helpful in reaching our conclusions.

All of the employees who were downgraded were qualified to perform the job to which they were assigned, and downgradings were necessary only because of the needs of the business and the weakened economy. While both men and women were affected by the downgrading, women suffered a disproportionate number of downgradings in each M-level category. The percentages of men and women are illustrated in the table below.*

Grade Level	% Females In Grade	% Females Of Those Downgraded	% Males In Grade	% Males Of Those Downgraded
M-50	4%	17%	96%	83%
M-40	46%	66%	53%	33%
M-30**	84%	87%	16%	12%
M-20	69%	73%	31%	27%
M-10	90%	100%	10%	0%

* Employees transferring to the hourly universe are excluded from the percent of those downgraded. The number of transfers totaled 13; consisting of one (1) male in the M-50 level, two (2) males in the M-40 level, one (1) male at the M-10 level and nine (9) females at the M-10 level. The chart also does not reflect second downgradings. Women suffered the brunt of second downgradings, and the inclusion of

such data would further amplify the disproportionate impact on women.

** Includes two (2) women who took voluntary layoffs rather than being downgraded. One (1) of the males that is shown downgraded by the records and this chart, was given protected-pay treatment and suffered no loss in pay from the downgrade.

Additionally, with the exception of two males at the M-40 level who declined to return to the hourly universe, all eighteen of the forced layoffs were women. Given these statistics, and the numerous instances of discriminatory treatment of females by male supervisors, the court finds that a *prima facie* case of sex discrimination with respect to the class has been established.

Defendant's articulated reasons for the order in which the salary-graded employees were downgraded are set forth as follows:

(a) Employees with outstanding ratings were protected where possible, while employees with low ratings were selected first.

(b) Employees with secretarial and computer-related skills were retained in their classifications where possible, because of the needs of the business. Installation employees working on installation projects also were not considered for downgrading.

(c) Where the above considerations were not applicable, employees were selected for downgrading in order of their time-in-grade seniority date.

Plaintiff has failed to establish that defendant's protection of secretarial and certain employees with computer-related skills was a mere pretext for sexual discrimination. During this period of time competent secretaries were in short supply in the general labor force and the computer operators that were not downgraded possessed specific skills necessary for the needs of the business.

The court is satisfied that plaintiff has established by a preponderance of the evidence that the performance standards, the installation employee criteria and the time-in-grade criteria were pretextual reasons utilized by defendant and were applied inconsistently in order to treat men more favorably than women.

Attachment "A", taken from defendant's Exhibit S, reveals that Lorene Stanley was the only female in the M-50 category, and had a performance rating of "good" and "ready now" for promotion with a date-in-grade of 4-1-74. She was downgraded on 6-15-75 to M-40. She was not given protection over male employees with ratings of "good and not promotable" as was A. L. Whitacre, a male with only six months more time-in-grade. Defendant indicated it did not downgrade C. B. Martin because of his work in installation, but Mr. Martin's employment records do not indicate he worked in installation. Western Electric's work force reports on December 31, 1974, fail to reveal any M-50 males working in installation.

In the M-40 grade level, as illustrated by Attachment "A", individuals with alleged installation functions were not protected. R. E. Hardin, a male with less time-in-grade and performance ratings similar to downgraded

women, was not downgraded on 6-15-75 to M-30, but was laterally transferred back to the shop on 2-1-76. Further evidence of the inconsistencies in applying the criteria set forth by defendant are illustrated by comparison of Brown, Hook, Cole, Hale, Volner and Wegley. Although Volner, a female, had more time-in-grade than Cole or Hale, both males, she was downgraded. Presumably, her rating of "not promotable" entered into this decision. However, Wegley, a male, also had a rating of "not promotable" but was not downgraded prior to Brown or Hook, females with ratings of "good and ready now."

At the M-30 level, J. D. Milburn was shown as downgraded from an M-30 to M-20, but documents in evidence indicate he was given protected treatment in pay matters and suffered no loss of income.

In the M-20 level, as illustrated in Attachment "A", R. J. Fortune, a male, although having a similar performance rating, but less time-in-grade than several of the women, was not downgraded. Defendant contends that he was not subject to downgrading because he was an installation employee. However, review of his employment records does not reveal he worked in installation, and the work force reports fail to list any M-20 males working in installation at that time. Comparison between Cook, Draskovic, Phillips and Calvin reflect further discrepancies in downgradings. Although these employees had similar ratings and were downgraded to level M-10 on 12-1-74, all three women were laid off on 6-13-75 while Phillips was retained, even though Calvin had more time-in-grade than Phillips.

In the M-10 level, as illustrated by Attachment "A", the vast majority of employees were female. A number of these employees were laterally transferred to the shop in 1974. With a few exceptions, all of the females remaining in M-10 level were laid off. D. M. Gates, a male, was not affected by the downgrading according to defendant, because he was assigned to installation. Our review of Western Electric's work force reports on December 31, 1974, again fails to reveal any M-10 males assigned to the installation division during this period of time. Furthermore, although he was listed as an installation employee on his personnel record, he was promoted to a service center job ahead of women who had previously been downgraded from service center jobs.

The effect of these downgradings has carried through to the promotions made since 1976. As previously mentioned, neither parties' statistics or the expert testimony with respect to promotions has been particularly helpful because of inappropriate underlying assumptions. However, the evidence was such that even a layman could draw certain general conclusions. The company policy of re-upgrading those who had previously been downgraded was generally followed, although males did get some significant promotions ahead of women the first couple of years after the re-upgradings began. Defendant attempted to justify these promotions on the basis of particular skills, but given the attitude of some supervisors that only men were qualified, the court must conclude defendant's reasons for giving men more favorable treatment over women were pretextual. In fairness to defendant, it should be noted that promotions for women in 1979 and 1980 improved significantly.

In addition to the numerous examples presented through testimony of members of the class, defendant's discriminatory treatment of the individual plaintiff Pitre illustrates the difficulties that women in the salary-graded levels at Western Electric have experienced since 1974. The subjective decisions for promotions, assignments and downgrading were made by men who apparently refused to accept the mandates of Title VII prohibiting discrimination on the basis of sex. The examples of preferrential [sic] treatment of men over women were not merely isolated instances or "accidental in nature," but were so pervasive throughout the Merriam and Lenexa facilities that the only rational conclusion to be reached is that defendant practiced sex discrimination with respect to salary-graded women.

Because of the court's finding of liability on the part of defendant to both plaintiff Pitre and the members of the class, further proceedings to establish an appropriate remedy are necessary. In the near future, the court will confer with counsel of both parties to define the issues for a remedy hearing.

The foregoing shall constitute the court's findings and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

Dated this 9th day of August, 1983, at Kansas City, Kansas.

/s/ Earl E. O'Connor
EARL E. O'CONNOR,
Chief Judge

M-50'S DOWNGRADED OR NOT AFFECTED 1974 – 1976

NAME	SEX	DATE IN GRADE	SPECIAL NEEDS JOB	ABILITY, PERFORMANCE AND POTENTIALITY RATING PRIOR TO ACTION*	ADVERSE ACTION
LG Stanley	F	04-01-74		G,RN	DG 06-15-75 to M-40
EA Tesson	M	02-19-74	Installation (Field)	G,NP	Returned to Installation as Hourly Employee 01-12-76
JK Morrison, Jr.	M	10-01-73		O,RN	
SE Endicott	M	10-01-73		G,NP	DG 06-15-75 to M-40
CB Martin	M	10-01-73	Installation (Office)	G,NP	
AL Whitacre	M	10-01-73		G,RN	
JE Russell	M	10-01-73		G,NP	DG 06-15-75 to M-40
RD Edwards	M	09-01-71		O,RN	
CJ Leon	M	09-01-71		G,NP	DG 06-15-75 to M-40
WL Gilhaus	M	07-01-71		G,NP	
RJ Hinkle	M	07-01-71		O,RN	
EE McCracken	M	07-01-71		O,NP	
RA Youmans	M	11-01-70		G,NP	
LA Mertz	M	03-01-70		G,NP	
GF Koran	M	05-19-69		G,NP	
LB Mertz	M	12-15-68		G,NP	
GW Pugh	M	04-15-68		G,NP	
ME Jones	M	03-01-68		G,NP	

*The rating in effect at the time of adverse action is given. During this period the Company had appraisal ratings as of 09-01-74 and 03-01-75. If no adverse action, rating given is as of 03-01-75.

M-50'S DOWNGRADED OR NOT AFFECTED 1974 – 1976

NAME	SEX	DATE IN GRADE	SPECIAL NEEDS JOB	ABILITY, PERFORMANCE AND POTENTIALITY RATING PRIOR TO ACTION	ADVERSE ACTION
FC McGee	M	01-01-68		Not rated (Ass't. Buyer reporting to region)	
RF Timmons	M	08-15-67		G,NP	
RM Thomas, Jr.	M	10-01-64		G,NP	
JE Jones	M	07-01-63		G,NP	DG 06-15-75 to M-40
WF Ruch	M	11-01-61		Not rated (retired before downgradings)	
CR Hunt	M	04-01-57		G,NP	
RC Updike	M	03-15-55		G,NP	DG 06-15-75 to M-40

M-40'S DOWNGRADED, LAID OFF OR NOT AFFECTED 1974-1976

NAME	SEX	DATE IN GRADE	SPECIAL NEEDS JOB	ABILITY, PERFORMANCE AND POTENTIALITY RATING PRIOR TO ACTION*	ADVERSE ACTION
RD King	M	03-18-74	Installation (Field)	G,RN	Returned to Hourly rated group 07-15-75. Resigned 09-28-75.
HJ Bevil	M	03-18-74	Installation (Field)	G,RN	Laid off 12-24-75 upon declining to return to hourly group
WC White	M	03-18-74	Installation (Field)	G,RN	Laid off 01-09-76 upon declining to return to hourly group
ER Cronin	M	02-01-74		O,RN	
RE Hardin	M	12-17-73		G,RN	Former Shop employee. Returned to Shop 02-01-76
BE Hartsell	F	12-01-73	Computer Room Methods Investigator	G,RN	
DA Burnett	M	10-01-73		O,RN	
JV Hotchkiss	F	09-28-72	Secretary	G,RN	
DH Johnson	F	08-01-72		G,RN	DG 06-15-75 to M-30
JH Deutman	F	08-01-72		G,RN; L,NP	DG 06-15-75 to M-30. DG 02-01-76 to M-20
RG Attebery	M	04-01-72		N/A	Transferred to Region 02-06-75; DG 08-01-77 to M-30 upon return to Service Center
JG Fanning	F	06-15-71		G,RN	DG 06-15-75 to M-30

*The rating in effect at the time of adverse action is given. During this period the Company had appraisal ratings as of 09-01-74 and 03-01-75. If no adverse action, rating given is as of 03-01-75.

M-40'S DOWNGRADED, LAID OFF OR NOT AFFECTED 1974-1976

NAME	SEX	DATE IN GRADE	SPECIAL NEEDS JOB	ABILITY, PERFORMANCE AND POTENTIALITY RATING PRIOR TO ACTION	ADVERSE ACTION
MB Brown	F	12-01-70		G,RN	DG 06-15-75 to M-30
GW Moore	F	04-01-70		O,RN	
ML Read	M	03-01-70		O,RN	
HD Hook	M	03-01-70		G,RN	DG 06-15-75 to M-30
BC Miller	F	02-01-69		O,RN	
MV Miller	F	02-01-69		O,RN	
GR Cole	M	01-01-69		G,RN	
RE Hale	M	10-01-68		G,RN	
EE Volner	F	02-01-68		G,NP	DG 06-15-75 to M-30
JR Reeder	M	01-15-68		G,RN	
DJ Hicks	M	07-01-67		G,RN	
SP Rogers	F	06-01-67		O,RN	
MD Groh	F	05-22-67		NR, NP	DG 12-01-74 to M-30. Took voluntary layoff 06-27-75.
IG Hueston	F	10-01-66		G,RN	
JR Staley	M	08-15-66		G,RN	
RE Wegley	M	10-15-65		G,NP	

M-30's DOWNGRADED, LAID OFF OR NOT AFFECTED 1974 – 1976

NAME	SEX	DATE IN GRADE	SPECIAL NEEDS JOB	ABILITY, PERFORMANCE AND POTENTIALITY RATING PRIOR TO ACTION*	ADVERSE ACTION
LM Campbell	F	07-01-74	Secretary to Asst. Manager	G,RN	DG 02-01-76 to M-20 upon becoming secretary to Department Chief
DM Thorington	F	06-01-74		G,RN	DG 02-01-76 to M-20
JD Milburn	M	02-01-74		G,NP; G,RN	DG 01-01-75 to M-20. DG 06-15-75 to M-10
SS Tribble	F	10-01-73		G,RN	Took Voluntary Layoff 06-27-75
RS Stroth	F	10-01-73		G,RN	DG 02-01-76 to M-20
GE Mays	M	10-01-73	Computer Operator (1st Shift)	G,RN	
CS Smerchek	F	07-01-73		O,RN	
CA Martin	F	06-01-73		G,RN	DG 06-15-75 to M-20
RF Cooper	M	05-23-73		G,RN	DG 06-15-75 to M-20
CL Grosdidier	F	05-15-73		G,RN	DG 06-15-75 to M-20
KC Bowdish	F	08-01-72		G,NP; G,NP	DG 12-01-74 to M-20. DG 05-01-75 to M-10
GJ Holland	F	03-01-72		G,NP	Took Voluntary Layoff 05-30-75
DB Swope	F	04-12-71		G,RN	DG 06-09-75 to M-20
CS Walsh	F	01-16-71	Installation (Secretary)	O,NA	
KK Shepherd	F	09-01-70		G,NP; G,NP	DG 04-01-75 to M-20. DG 06-15-75 to M-10
RW Kelly	M	08-01-70	Computer Operator (3rd Shift)	G,RN	

NAME	SEX	DATE IN GRADE	SPECIAL NEEDS JOB	ABILITY, PERFORMANCE AND POTENTIALITY RATING PRIOR TO ACTION*	ADVERSE ACTION
ST Brannon	F	06-08-70		G,NP; G,NP	DG 12-01-74 to M-20. DG 05-01-75 to M-10
JD Rainwater (Rupp)	F	02-01-70		G,RN	DG 15-75 to M-20

*The rating in effect at the time of adverse action is given. During this period the Company had appraisal ratings as of 09-01-74 and 03-01-75. If no adverse action, rating given is as of 03-01-75.

M-30'S DOWNGRADED, LAID OFF OR NOT AFFECTED 1974 – 1976

NAME	SEX	DATE IN GRADE	SPECIAL NEEDS JOB	ABILITY, PERFORMANCE AND POTENTIALITY RATING PRIOR TO ACTION	ADVERSE ACTION
BH Wienke	F	02-01-70		G,RN	DG 06-15 to M-20
SR Reed	F	02-01-70		G,RN	
G.V. Smith	F	06-08-69		O,RN	
CW Williams	F	07-05-68		G,RN	DG 06-15-75 to M-20
RP Johnston	F	05-01-68		O,RN	
SB Kilgore	F	05-01-68		O,RN	
AH Wynne	F	08-01-67		G,NP	DG 05-01-75 to M-20

M-20'S DOWNGRADED, LAID OFF OR NOT AFFECTED 1974 – 1976

NAME	SEX	DATE IN GRADE	SPECIAL NEEDS JOB	ABILITY, PERFORMANCE AND POTENTIALITY RATING PRIOR TO ACTION*	ADVERSE ACTION
DS Pittman	F	07-15-74	Secretary	G,RN	
JA Alonzo	F	06-01-74	Installation (Secretary)	G,RN	
ML Nolte	M	10-01-73		G,RN	DG 06-15-75 to M-10
DS Hodge	F	10-01-73	Secretary	O,RN	
SD Kreighbaum	M	10-01-73	Computer Operator (Second Shift)	G,RN	
PD Jones	F	10-01-73		G,RN	DG 06-15-75 to M-10
DS DeGraeves	F	10-01-73		G,RN	DG 06-15-75 to M-10
RJ Fortune	M	10-01-73	Installation (Office)	O,RN	
ED Finnell	F	08-01-73		G,NP	DG 04-01-75 to M-10
KJ Cook	F	07-01-73		G,NP; G,RN	DG 12-01-74 to M-10. Laid Off 06-13-75
JB Schooler	F	03-01-73		O,RN	DG 06-15-75 to M-10
RW Mead	M	11-15-72		G,RN	DG 06-15-75 to M-10
BL Draskovic	F	08-01-72		G,RL; G,RN	DG 12-01-74 to M-10. Laid Off 06-13-75
WG Wilhoite	F	02-01-71		O,RN	DG 06-15-75 to M-10
ME Phillips	M	01-01-71		G,RL	DG 12-01-74 to M-10
AM Calvin	F	04-01-69		G,RL; G,RN	DG 12-01-74 to M-10. Laid Off 06-13-75

*The rating in effect at the time of adverse action is given. During this period the Company had appraisal ratings as of 09-01-74 and 03-01-75. If no adverse action, rating given is as of 03-01-75.

M-10'S LAID OFF, TRANSFERRED TO SHOP OR NOT AFFECTED 1974 – 1976

NAME	SEX	B.S.D	SPECIAL NEEDS JOB	ABILITY, PERFORMANCE AND POTENTIALITY RATING PRIOR TO ACTION	ADVERSE ACTION
CM King	F	01-07-74		G,RN	Laid Off 12-06-74
LD Martin	F	08-27-73		G,RN	To Shop 11-18-74
ML Jones	F	08-15-73		G,RL	To Shop 11-04-74
SC Tuckfield	M	04-10-73		G,NP	To Shop 11-18-74
MK Tomlin	F	12-18-72		G,RL	Laid Off 12-13-74
CS Graham	F	12-11-72		G,RL	To Shop 11-25-74
SR Hughes	F	12-02-72		O,RN	To Shop 11-25-74
MK Cockburn	F	11-27-72		G,RL	To Shop 11-11-74
AL Long	F	11-06-72		G,RL	To Shop 11-27-74
ME Farrar	F	11-02-72		G,RL	To Shop 11-25-74
JR Berry	F	08-21-72		G,RN	Laid Off 12-06-74
PA Chase	F	08-17-72		G,RN	Laid Off 03-14-75
IG Mendez	F	07-26-72		G,RN	Laid Off 06-13-75
HJ Hood	F	06-01-72	Keypunch	O,RN	Recalled 08-11-77
PT Pitts	F	05-18-72		–	Laid Off 03-27-75
PH Gulley	F	10-26-71	Personnel Experience	G,RN	

M-10'S LAID OFF, TRANSFERRED TO SHOP OR NOT AFFECTED 1974 – 1976

NAME	SEX	B.S.D	SPECIAL NEEDS JOB	ABILITY, PERFORMANCE AND POTENTIALITY RATING PRIOR TO ACTION	ADVERSE ACTION
BD VanBibber	F	08-16-71		G,RN	Laid Off 12-06-74
EM Sullivan	F	08-05-71		G,NP	Laid Off 12-06-74
BA Bradley	F	08-05-71		O,RN	Laid Off 06-13-75
DJ Cross	F	07-06-71		L,NP	To Shop 11-18-74
DA Belk	F	05-17-71		G,RN	Laid Off 06-13-75
AP Gomez	F	03-23-71		G,NP	Laid Off 02-14-75
MW McCracken	F	12-09-70		G,RN	Laid Off 06-13-75. Recalled 04-06-76
R Burton	M	12-07-70		G,RL	To Shop 11-04-74
MH Garth	F	06-16-70	Keypunch	G,RN	
SB Fuller	F	06-01-70		G,RN	
DM Gates	M	04-16-70	Installation (Office and Field)	O,RN	
DH Brannon	F	04-13-70		G,RL	Laid Off 06-13-75. Recalled 06-08-76
RS Lepping (Williams)	F	12-17-69		G,RN	Laid Off 12-06-74
DM Pitts	F	12-08-69		G,RN	Laid Off 01-31-75

FILED
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No. 93-433

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ESTATE OF JANICE D. PITRE,
Petitioner,
v.
WESTERN ELECTRIC COMPANY, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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October 13, 1993

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-433

ESTATE OF JANICE D. PITRE,
Petitioner,

v.

WESTERN ELECTRIC COMPANY, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

REASONS FOR DENYING THE PETITION

Petitioner here seeks review of a decision of the Tenth Circuit that held that the district court had applied the correct standards in computing damages in a class action brought under Title VII of the Civil Rights Act of 1964. Petitioner claims that the Tenth Circuit has adopted a rule that "ambiguities" are to be resolved against Title VII plaintiffs, contrary to this Court's admonitions in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), and to the decisions of other courts of appeals.

This claim is meritless. In an earlier decision in this case, the Tenth Circuit *reversed* the district court's initial back pay award on the ground that it did not account for all the effects of the past discrimination and violated the very principles petitioner urges. On remand, the district court considered all the elements of harm in recomputing

damages, and the district court rejected petitioner's and respondent's damages theories on the grounds they would overcompensate or undercompensate the class. In the decision at issue, the Tenth Circuit held that the district court had discharged its "duty to provide compensation equal to the injury," and the Tenth Circuit cited and applied *Albemarle Paper Co.* Pet. App. at 7a.

This decision is simply the correct application of well-settled legal principles to a set of unique facts. The only way petitioner can argue otherwise is by ignoring the prior district court and Tenth Circuit decisions in this case and by misstating the grounds of the decision directly at issue.

1. In its initial liability decision, the district court found that respondent had violated Title VII during the relevant period from December 1974 to December 1980 by discriminating against women in "decisions for promotions, assignments and downgrading." Pet. App. at 136a. In a separate decision, the court awarded the class back pay, front pay and injunctive relief. The court calculated a class-wide award in the following manner. For each year at issue, it multiplied the number of promotions to a given level by the percentage of women in the level immediately below. *Pitre* v. *Western Elec. Co.*, No. 76-218-C2, slip op. at 4 (D. Kan. Dec. 14, 1984). Subtracting the number of women who were actually promoted, the court determined the number of additional promotions women should have received. *Id.* It then calculated the amount of money these additional promotions would have yielded. *Id.* at 5. For each succeeding year, the court adjusted the number of women in the relevant available pool to reflect the additional promotions that should have been made the year before. *Id.* at 4.

Plaintiffs argued that the relevant pool for promotions should include persons in all levels below the level in which the promotion was made, rather than the level immediately below. The district court rejected this claim, finding that "[t]he usual practice was that persons were

to be promoted from one level to the next higher level." *Id.* at 3.

2. On appeal, plaintiffs reiterated their objection to the "next lower grade" pool. The Tenth Circuit rejected the challenge, explaining that evidence that some individuals were promoted more than one level did "not render clearly erroneous the district court's decision to focus on the more common progression in fashioning a remedy." Pet. App. at 102a n.11.

The Tenth Circuit did agree, however, that, in calculating back pay, the district court had failed to account for the lingering effects of pre-1974 discrimination and had erred in attempting to use front pay to remedy an inadequate back pay award. Pet. App. at 101a. Nevertheless, it did not condemn the district court's basic approach to calculating back pay. Instead, it noted that, on remand, the method:

> could again be used. The court must, however, either attempt to account for the effect of past discrimination on the position of women at the beginning of the relevant period or explain why such consideration is unnecessary. Pet. App. at 103a.

3. On remand, the district court accounted for the effects of past discrimination "by developing a hypothetical work force which would have been in place at the end of 1974 if the defendant had not discriminated against women in promotions and downgrades between 1965 and 1974." Pet. App. at 27a-28a. The court approximated the distribution of women and men in the 1965 work force, "then analyzed the promotions and downgrades for each grade in each year, and determined . . . the number which would have gone to women absent discrimination." Pet. App. at 28a. Having thus accounted for past discrimination, the court applied its previously-approved method of calculating back pay for promotions lost during the relevant time period. Pet. App. at 29a.

The court rejected plaintiffs' proposal that back pay be calculated based on the entire difference between the salaries paid to men and women in the relevant levels. The court explained that (Pet App. at 25a):

> [a]t issue in this action are a finite number of identifiable decisions by the defendant regarding promotions and downgrades. We should focus [on] these specific decisions and award the plaintiff damages when there is discrimination, rather than simply determining whether wom[en] received a pro rata portion of all salaries paid.

Finally, the court again rejected plaintiffs' contention that the appropriate pool for promotions to each grade consisted of the employees in all lower grades, rather than those in the next lower grade. Pet. App. at 27a.

4. The Tenth Circuit upheld the back pay award on appeal. It recognized that "the district court's exercise of discretion in awarding back pay must be 'measured against the purposes which inform Title VII,'" and that one purpose is to "make[] 'persons whole for injuries suffered on account of unlawful employment discrimination.'" Pet. App. at 6a (quoting *Albemarle Paper Co.*, 422 U.S. at 417-18). The Tenth Circuit found that the district court's method of computing back pay was "an acceptable approach to the court's duty to provide compensation equal to the injury." Pet. App. at 7a (citing *Albemarle Paper Co.*, 422 U.S. at 418-19). It also held, once again, that "the court's decision to calculate the amount of back pay on a step-by-step basis was not clearly erroneous." *Id.*

5. Petitioner repeatedly claims that the district court made "assumptions" and "resolved ambiguities" in a way that failed to make class members whole and instead gave respondent "the benefit of past discrimination." On the contrary, however, both courts sought to eliminate the lingering effects of past discrimination. The "assumptions" petitioner attacks were factual determinations that the courts relied on in attempting to make the class whole.

a. Petitioner contends that the district court's use of the "next lower grade" in determining the promotions women lost "markedly benefitted the employer" and that this "ambiguity" should have been resolved in plaintiffs' favor. Pet. 9-10. The Tenth Circuit, however, twice upheld the district court's finding that "the more common progression" was for employees to advance one grade at a time. Pet. App. at 102a n.11; see also Pet. App. at 7a. This express factual finding—which is amply supported by the record [1]—takes precedence over a general rule requiring that ambiguities be resolved in favor of Title VII plaintiffs. Indeed, in light of this finding, the district court properly "refused to *assume* . . . that half of all promotions since 1965 would have gone to women." Pet. 23 (emphasis added).[2]

b. Equally baseless is petitioner's claim that the district court incorrectly "assumed" that the class was injured by " 'a finite number of identifiable decisions by the defendant regarding promotions and downgrades.' " Pet. App. at 10. The court focused on these decisions precisely because plaintiffs claimed they were "discriminated against in assignment, promotion, downgrading, or lay-

[1] Petitioner points to 29 multiple-grade promotions between 1965 and 1981. Pet. 9. But, as petitioner elsewhere obliquely acknowledges, there were 140 promotion opportunities between 1965 and 1974 alone.

[2] Petitioner claims that the lower courts' refusal to adopt an assumption of parity creates a circuit conflict. But in *Thompson* v. *Sawyer*, 678 F.2d 257 (D.C. Cir. 1982), the D.C. Circuit did not announce a general rule of parity. Instead, it found such an assumption reasonable because a 1969 Executive Order required the defendant agency "to take affirmative steps to end employment discrimination." *Id.* at 292; *see also McKenzie* v. *Sawyer*, 684 F.2d 62, 78 (D.C. Cir. 1982). In *Hameed* v. *International Association of Bridge, Structural & Ornamental Iron Workers*, 637 F.2d 506 (8th Cir. 1980), the Eighth Circuit did *not* require the district court to assume that half of all positions would go to class members, but rather required a calculation based on the percentage of class members in the available pool. *Id.* at 520-21.

offs." Pet. 3; see also Pet. App. at 1a (plaintiffs alleged "discrimination with respect to promotions and downgrades"). By creating the hypothetical 1974 work force, the district court adjusted for the fact that discrimination before 1974 exacerbated the economic harm that the chalienged promotion and demotion decisions occasioned.

But the court properly refused to award as back pay the entire salary differential between men and women during the relevant period. Plaintiffs never attempted to show, and could not have shown, that this "earnings gap" resulted from either the challenged promotion and demotion decisions or any pre-1974 discrimination,[3] and the district court made no such finding. The back pay calculation plaintiffs proposed represented an impermissible windfall recovery.[4]

6. Even if the two challenged "assumptions" were incorrect—and they are not—the decisions below raise no issues worthy of this Court's consideration. Neither court held that "ambiguities" in the record were to be resolved in favor of a discriminating employer.[5] To the contrary, the lower courts plainly endeavored to ensure

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[3] A number of factors, most significantly seniority, also accounted for this differential.

[4] *See United States* v. *United States Steel Corp.*, 520 F.2d 1043, 1056 (5th Cir. 1975) (rejecting back pay award based on "indiscriminate . . . wage averaging"), *cert. denied*, 429 U.S. 817 (1976); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 262 n.152 (5th Cir. 1974) (class-wide back pay award must "avoid . . . granting a windfall to the class at the employer's expense"); *see also Hameed*, 637 F.2d at 520 (in calculating class-wide back pay award, court must "estimat[e] the number of apprentice positions that were denied" class members).

[5] In fact, the courts resolved ambiguities adversely to respondent by treating reclassifications and upgrades of previously demoted individuals as promotions and by ignoring the statistical over-promotions of women during the late 1970s. *See* Pet. App. at 26a-27a.

that the lingering effects of pre-1974 discrimination did not limit plaintiffs' recovery.

Moreover, the very cases petitioner cites recognize that district courts "must be granted wide discretion in resolving ambiguities." *Stewart* v. *General Motors Corp.*, 542 F.2d 445, 452 (7th Cir. 1976) (citing *Pettway*, 494 F.2d at 260-61), *cert. denied*, 433 U.S. 919 (1977); *Wells* v. *Meyer's Bakery*, 561 F.2d 1268, 1273 (8th Cir. 1977) (same). No court has suggested that "it is impermissible for a district court or a court of appeals to reject a remedial approach suggested by the injured employees." Pet. 21. Whether, on the unique facts of this case, the district court properly exercised its "wide discretion" here —and respondent submits that the court plainly did—is not a question requiring this Court's review.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted.

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SUPREME COURT, U.S.
FILED
OCT 27 1993
OFFICE OF THE

No. 93-433

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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ARGUMENT

The arguments made by the respondent demonstrate that, unless this Court grants review of the petition for writ of certiorari and reverses the judgment of the court of appeals, victims of gender discrimination in the United States Court of Appeals for the Tenth Circuit and in any other circuit that chooses to follow the novel approach taken below will never receive damages commensurate with the injury they have suffered.

The fundamental flaw in the reasoning of the court of appeals is repeated in the Brief in Opposition at 7. Respondent argues that "the very cases petitioner cites recognize that district courts 'must be granted wide discretion in resolving ambiguities.' *Stewart v. General Motors Corp.*, 542 F.2d 445, 452 (7th Cir. 1976) (citing *Pettway*, 494 F.2d at 260-61), *cert. denied*, 433 U.S. 919 (1977); *Wells v. Meyer's Bakery*, 561 F.2d 1268, 1273 (8th Cir. 1977) (same)." But, until the decision below, no circuit had held that in resolving ambiguities, the district court *has discretion to resolve them in favor of the employer*. That is precisely what the district court did in the instant case, as demonstrated in the petition for certiorari and explained briefly below. Petitioner agrees that a district court has wide discretion in choosing how to resolve ambiguities in a Title VII case, *provided, however, that they are resolved in favor of injured victims*. For the first time in Title VII litigation, the lower courts resolved ambiguities in favor of an employer who had deliberately discriminated against women both before and after Title VII made such discrimination illegal.

Respondent cannot and does not challenge the finding of the district court, affirmed by the court of appeals, that it engaged in pervasive intentional discrimination from 1965 until 1981, and that it was therefore liable for back pay for the class period, which ran from June 1973 to January 1981, and for front pay thereafter. Nor can respondent dispute the record evidence that respondent's work force was approximately evenly divided between men and women at all relevant times in this case. Thus, absent discrimination, there is no reason to believe that the promotions that took place would not have been evenly divided between men and women and that demotions and layoffs would not have been approximately equal between the sexes.

It is, of course, impossible for any court to know whether, absent discrimination, there would have been no statistical difference between the success rate of men and women in the work place. Precisely because it is impossible to know exactly what the statistics would have been had there been no pervasive and intentional discrimination over three different decades, it was essential under Title VII that the district court recognize that, in light of the impossibility of knowing the success rates with any certainty, the plaintiff class was entitled to the benefit of the doubt. That is why the plaintiffs suggested to the district court that it should assume that, absent discrimination, half of the promotions from 1965 to 1981 would have gone to women.[1] Based on that assumption,

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[1] Had it done so, at least half of all section chief positions and Service Center salaried jobs would have been filled by women.

half the salaries at each salary-graded level and at section chief would have been paid to women.[2]

In the first appeal, the Tenth Circuit reversed and remanded the matter to the district court because the court "ignored the effect of past discrimination on the current position of women in the company." Pet.App. 41a. On remand, the district court explicitly recognized that it was impossible to know exactly what percentage of women would have been at any promotional level from 1974 through 1980, and the district court therefore decided to create an "entirely hypothetical" work force. Pet.App. 41a. Thus, instead of resolving the ambiguity of the exact percentage of women who would have been employed in each category in favor of the victims injured by respondent's discrimination, the district court created *sua sponte* an imaginary construct to determine the employment ratio of men to women had there been no discrimination from July 1965 to December 1974. Beginning with a totally hypothetical construct unsupported by facts, the district court proceeded to determine the actual number of promotions and downgrades that could be

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[2] Respondent's argument that seniority was a valid factor accounting for the male/female earnings gap is but an echo of earlier attempts to justify discrimination on the basis of a seniority system not found to be *bona fide*. The district court found that seniority ("time-in-grade") was a mere pretext for invidious discrimination in demotions and promotions during the 1970's (Pet.App. 132a-135a). The Tenth Circuit agreed in *Pitre I* (Pet.App. 81a-85a). The earnings gap during the 1970's was in part the product of its persistent, illegal promotion practices after July 2, 1965, which allowed males to accumulate greater time-in-grade at the upper M-levels and at section chief – positions involving higher salary ranges.

allocated to men and women under the imaginary and hypothetical numbers with which the district court began. Pet.App. 41a. The court abused its discretion in choosing this approach and departed from the requirements set forth in the opinions of this Court and every other circuit.

The district court's approach resolved ambiguities in favor of the discriminating employer and was therefore completely inconsistent with every other circuit that has addressed the issue. Contrary to the suggestion in the respondent's Brief in Opposition at 4, the class members do not challenge factual findings by the district court. They challenge *only* the district court's decision to deal with the impossibility of reconstructing respondent's work force for the period 1965-1974 by resolving ambiguities in respondent's favor rather than in favor of the victims of respondent's persistent and continual discrimination.

By ignoring the only reasonable approach to resolving the ambiguity in calculating promotions – the assumption of parity between the sexes in promotions – the district court necessarily adopted a hypothetical promotion scheme that mirrored the discriminatory practices that gave rise to this suit. The district court's approach is without factual support. The court admittedly engaged in no fact-finding, since there were no facts to find. And the district court rejected the assumption of parity, even though it was clearly available as a reasonable option and

resolved ambiguities in favor of the victims of discrimination as required by law.[3] In rejecting parity, the district court gave no reasons.

Petitioners suggest that, absent a factual basis for choosing another assumption, if the doctrine that ambiguities must be resolved in favor of victims is to have any meaning at all the assumption of parity is required in a work place in which women and men have a history of virtually equal representation. In the instant case, the lower courts reject the assumption of parity without justifying the rejection and instead adopt a fictional promotional scheme that mirrors the respondent's history of discrimination and denies petitioners a reasonable and equitable remedy.

The courts' approach undermines the "make whole" purpose of Title VII recognized in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). A court that resolves ambiguities in favor of the discriminating employer cannot award "the most complete relief possible." *Id.* at 421. This is so because this approach undervalues the effects of past discrimination.

The District of Columbia Circuit recognized in *Thompson v. Sawyer*, 678 F.2d 257, 290 (D.C.Cir. 1982), that

> [w]hen discrimination continues over time . . . the harms it causes are compounded. An employee denied a raise in one year will fall further behind in subsequent years if raises in

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[3] Parity as the guiding principle in a "rightful place" remedy was also fully supported by the evidence at trial that the skills necessary for satisfactory performance at most jobs could be and indeed were learned through on-the-job training.

> subsequent years are a function of prior salaries. Likewise, an employee denied a promotion in a given year may be frozen out of additional promotional opportunities, unless the missed rung on the promotion ladder is somehow replaced. When the effects of illegal discrimination are compounded, basing the plaintiffs' compensation only on events within the two-year accrual period seriously shortchanges their recovery for the harm actually suffered during the accrual period itself.

The approach adopted by the district court here is the exact opposite of that used by two other circuits. In both *Thompson v. Sawyer*, *supra*, and *Hameed v. Intern. Ass'n of Bridge, Etc.*, 637 F.2d 506, 520-21 (8th Cir. 1980), the courts of appeals adopted a rule of parity (or proportional representation) in determining, *for remedial purposes*, how many class members would have been promoted absent discrimination during the relevant period. The circuit courts assumed that, under a nondiscriminatory selection process, class members would have been promoted in the same proportion as others. Inexplicably, the district court ignored this reasonable approach.

The district court's approach here, approved by the Tenth Circuit, signals a dangerous course for Title VII. If this decision is permitted to stand, district courts would have wide discretion to create imaginary reconstructions of past events that favor employers who have been guilty of the worst forms of discrimination and deny victims of discrimination a reasonable remedy. Petitioners respectfully suggest that this case is of enormous importance, and that the Court should grant review to announce that a district court has wide discretion in choosing how to

resolve ambiguities in a Title VII case, *provided, however, that they are resolved in favor of injured victims*. Until this case, that has been the law throughout the United States. It must remain the law if Title VII is to provide the remedy which Congress intended for victims of discrimination.

CONCLUSION

The interpretation of the lower courts' remedy approach advanced by the respondent underscores the prudence of granting the Petition for Writ of Certiorari so that the congressional purposes underlying Title VII and the make-whole principle of *Albemarle* may be reaffirmed and Title VII may continue to be an effective remedy against proven discrimination and a deterrent against future illegality.

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